STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
INDUSTRIAL WELFARE COMMISSION

Public Meeting

November 8, 1999
State Capitol, Room 112
Sacramento, California
PARTICIPANTS

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Industrial Welfare Commission

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COMMISSIONER CENTER: Good morning, everyone. As noticed, this is an informational fact-finding hearing on Senate Bill 60, implementation of the 8-hour day. With that, I’d like to call the roll of the other commissioners so we can open up the meeting.

Leslee Coleman?

COMMISSIONER COLEMAN: Leslee Coleman.

COMMISSIONER DOMBROWSKI: Bill Dombrowski

COMMISSIONER BROAD: Barry Broad.

COMMISSIONER CENTER: And Chuck Center. Seeing we have a quorum, we’ll commence our meeting.

What I’d like to do is just have individuals come forward and testify and make comment. If you have written comment, we would ask you to have seven copies to provide for the Commission.

And what we’re going to do today and next week is try to gather as much information on the impacts of AB 60 and try to provide as much guidance as we can, as early as we can in January, as to the effects of the changes in the overtime law.

With that, some -- oh, we have to also approve the minutes of the last meeting.

Has everyone read the minutes of the last meeting?
Do I have a motion to approve the minutes?

COMMISSIONER COLEMAN: So moved.

COMMISSIONER CENTER: Second?

COMMISSIONER BROAD: Second.

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

(Chorus of “ayes”)

COMMISSIONER CENTER: Opposed?

(No response)

COMMISSIONER CENTER: The minutes are adopted.

With that, we had some individuals that called ahead of time that would like to come up and testify first. They called this morning.

The first one with that request to testify is Willie Washington, with the California Manufacturers Association.

MR. WASHINGTON: Good morning, Mr. Chairman, members. Willie Washington, with the California Manufacturers Association. Thank you for the opportunity to speak, not necessarily first, but I did want to comment earlier because a lot of the testimony that you’re going to hear today will have a great deal to do with what the manufacturers are going to be doing a little later on.

I did prepare a very short comment letter for you that is being distributed, and I’ll kind of limit myself to that this morning because we’re still in the information-
First of all, I wanted to bring to the attention of the Commission that the number of changes AB 60 makes are really, really quite overwhelming. And this is one of the primary concerns that we have, is that there’s so much for the Commission to do before January 1, when this bill goes into effect.

Of primary concern to the California manufacturers, and the point that I’m going to be delving on or speaking to at almost every opportunity, will be the prohibition on the 12-hour shifts that will impact the manufacturers more directly. Our concern here is that, under the current law, under AB 60, an employer is going to be -- it’s going to prohibit the use of a 12-hour shift without the payment of overtime before 40 hours of work in a workweek.

Now, this has a real big problem because, for many of our members, that is the mainstay of their working. In other words, when we have employers who are working 24 hours a day, seven days a week, 365 days a year, the 12-hour shift is a mainstay. And to put them at a disadvantage of requiring that they pay overtime on a daily basis will have a negative impact on their competitiveness.

I have manufacturers who will be coming forward who are in those particular situations, and many of them
will also be bringing their employees along with them to give you some idea of the impact that that’s going to have on them, on them in terms of their competitiveness, and in terms of the employees, how it’s going to reshape their lives. And I think you’re going to be quite surprised, and you’re going to find a great deal of interest on the part of those employees who have changed from the rotating 8-hour days to the 12-hour shifts. And so, I’m looking forward to their coming forward and testifying on that particular area.

In addition, we found it very, very difficult to quantify this. I’ve been asked before the quantify this, the impact that we continue to say it will have on manufacturers. The Commission and others keep asking us to quantify that, and it has been extremely challenging and very difficult to do. We’re still trying to do that, and we’re making one last effort, all-out attempt to do that. And maybe by the 15th of December meeting in Los Angeles, we hope to be able to quantify the impact that it will have on these employers, and perhaps even on California’s economy.

So, that’s a target that we’re shooting for, to try to provide you some information as to the negative impact of this prohibition on 12-hour shifts.

We’re also concerned about the volume of the changes and the complexities of all of the changes that we have to go through. I’ve read the bill many times over, and
the bill is extremely, in many instances, ambiguous.
Certainly it’s contradictory, because in some instances you have the labor law which takes precedence over your regulatory issues, and yet and still you have back-and-forth exchanges as to who will be making the rules on what particular issues. And we think this makes it extremely difficult for the employers to understand and to be able to work with something that is so difficult to understand with any degree of certainty that what they’re doing is right.

And we think this is particularly germane considering that this bill also includes some new, fairly harsh monetary penalties. And to hold an employer accountable for something that they’re not yet able to understand and to put into place in the workplace and to comply with the law, we think, is just not fair. So, that’s one of the things that we would like for you to consider as a way of dealing with that, considering the fact that the bill is going to go into law on January 1, regardless of what we do here, what we get resolved, and so the employers are going to need some form of safe harbor as far as these penalties and things are concerned, if the Commission has not resolved it by the 1st of January.

I had indicated before that I had more questions than I did testimony, and that’s still true. But this -- I decided, after going over the bill, that it was much, much
too complicated, and too many of them, to bring forward at this time. So, what I did is I took those that are the most immediate, the ones that are the most urgent for the employers, the ones that they need to have an answer on now, and I did comment on those.

For example, the number of questions that I’ve received regarding whether or not an employer who had read AB 60, if they can take a vote now that would be recognized in 2000. Could they comply with 2000 by vote and have those things registered in 1999, and would they be applicable or acceptable in 2000? That’s one of the questions that is raised again and again and again.

The bill had what we call a grandfathering portion in there for some of the members -- some of those members are CMA’s members -- that attempted to allow those employers who had voluntary plans, who had complied with the law and were working up to 10-hour days, to continue those if they were in effect on July 1 of 1999. The problem is that the bill also required that all of those people volunteer again, in writing. And again, the question becomes, if those people volunteer again in writing in 1999 so that the program is still legitimate in 2000, is that going to be effective? Is that going to be legitimate? Would the commissioner view that as having been done properly?

Other problems deal with -- some complications
created by the bill is that it reinstates, for example, the old wage orders, the pre-1998 Wage Orders 1, 4, 5, 7, and 9. And it reinstates those, and it implies that we go back and we reimplement all of the things that we were doing prior to the changes that were made in 1998. But because AB 60 specifically does away with many of the things that were in the old wage orders, it creates a dilemma for us.

For example, if an employer is operating an alternative workweek under one of these orders, for example, would they be required to requalify the program under AB 60, for example? Even though they are operating under one of those old orders, come 2000, the criteria is different. And will they be required to requalify those programs?

Will the various exemptions that are contained in these orders, for example, be valid? For example, a parent, spouse, children of the employer and so forth are currently exempt. AB 60 specifically requires that they also be subject to overtime payments. And yet this will be in the old wage orders where they were exempt that we’re going back to. And the question becomes, what takes precedence, the AB 60 rule of the law or these regulations that we’re reimplementing come January 1 of 2000?

And then there’s some language in the bill. One of them in specific -- in specific that we’re concerned about is what is an employer’s overtime obligation to an
employee who works on a seventh -- on any seventh day of a
workweek? And again, it might be just semantics or the way
that the bill is written that it really didn’t mean what it
says. But without indicating in the bill that the days of
work have to be consecutive or something of that nature, it
implies that a person who works on the seventh day would be
due overtime pay, even if that was the only day of the week
that they worked, or even if it was the third day of the
week that they worked. Whatever your workweek happened to
be, according to this section, it would mean that overtime
would be due on any seventh day that you work. So, that’s
another clarification that we need, and need that fairly
quickly.

Some of the other requirements of the bill are
very, very complicated, and that’s why I decided that we
really need -- I needed to have more guidance from my folks.
For example, creating a menu of alternative work schedules,
without more definitive guidelines, is, you know, possibly a
problem for employers. For example, under AB 60, only the
employees get to choose what schedule that they would be
willing or able to work. Now, if you had several schedules
and employees chose to work the first one or the first two,
and the third or the fourth shifts, or whatever they
happened to be, did not have enough people left over to man
them, there’s nothing in there that would require the
employer or allow the employer to dictate which one of those employees would have to work on a shift that they did not want. If you were using a menu of alternative shifts, that’s the type of problem that this would generate if we don’t have some more definitive guidelines coming out of the Commission and others on how the employee can do that.

Developing a one-size-fits-all secret ballot process or disclosure requirement also creates a problem, and it’s going to be somewhat difficult. I know that from having talked with my members. I have some members where one particular avenue would be acceptable, and is not acceptable to another large segment of my employee population. In fact, that’s precisely why I’m not able to provide you with some recommendations in that particular area now. And I just want to make you aware of the fact that until I have some greater input from my members, I will not be able to do that.

However, we are scheduled -- the Manufacturers Policy Committee that deals with this issue is scheduled to meet on the 19th of this month. And at that time, we will be discussing this. And hopefully, I’ll get enough guidance at that time to be able to come back to you with something that we think would be something that the employers as a whole in manufacturing could work with.

Fundamentally, this is such a complicated issue
that the Manufacturers Association understands that it is
the law. We just want to make sure that our employers know
and understand what the law is. In trying to interpret the
law and implement the law, the Manufacturers Association
fully intends to work with the Commission and others, and
with the Labor Commissioner, to ensure that as this bill is
being developed and implemented, that we have input and to
work with you to try to make it a workable proposition for
both the employers and the employees of California.

Thank you for the opportunity to testify. And if
you have any questions, I’ll be happy to answer them at this
time.

COMMISSIONER DOMBROWSKI: Just a question, Willie,
on this. You talked about quantifying the economic impact
on your members. Are you going to be able to give us
anything on the economic impact on the employees?

MR. WASHINGTON: Actually, that’s the easiest part
because all of the employers that are working these
schedules can give me that quite quickly. And the answer is
yes.

COMMISSIONER BROAD: Willie, on some of those
issues that you’ve raised, I’ve thought about them myself,
and I think some of them, we’ve really got to avoid the
“Chicken Little” scenario and make more out of this than the
bill actually did.
For example, the bill clearly says that the Commission can retain or eliminate any exemption from provisions regulating hours of work that was contained in any valid wage order in 1997. So, if it restores wages orders, you know, temporarily, you know, on January 1, the bill says, they’re restored, and they’re restored with all their exceptions in them. And I don’t think there’s anything in the bill, for example, that intended to overturn the exemption of, you know, family members, or the one that deals with trucking or public employees or anything else. I don’t -- I believe that the bill was intended to restore daily overtime to people who lost it and to give them the choice of having alternative workweek arrangements. I don’t think it was intended to say that every exemption that were in valid wage orders at that time is wiped out and we’re starting from zero with nothing.

So, I think, to some extent, we need to avoid, you know, getting overwrought about this and to sort of -- because some of the issues you raised are very legitimate. I also think that, to some extent, some of it’s outside of the purview of the IWC. That is to say, how the Division of Labor Standards Enforcement intends to enforce these things is part of the issue. Now, it seems to me that if an employer complies with the provisions of the bill in terms of holding an election, and wishes to try to do that by
January 1, 2000, that it’s -- and follows those provisions, I would think it would be quite unfair to then impose some tremendous burden on them, from an enforcement point of view, because they did it in advance of the IWC considering the issues.

There is some, I think, small risk there that they do it wrong, that we make some change to the way things were done in 1997, or as we hear the issue, but it’s just hard for me to believe that with all, you know, the problems of employees who aren’t being paid the minimum wage at all in certain industries, or whose rights are being violated, that the Division of Labor Standards Enforcement has plenty to do without going after employers who are trying scrupulously to comply with this.

MR. WASHINGTON: I’m encouraged by your comments, Commissioner Broad, because I’m hoping that that’s the case, and that where it’s appropriate, that the Commission can speak to that point, that that was not the intent, even though that’s what the bill says in many instances. That would be very helpful if the Commission was to echo your sentiments there that that was not the intent of the law and do clarifications of that.

And I would also say that I’m totally in agreement with you that the Labor Commissioner can play a very, very critical role in this process, because, fundamentally, if
they are able to provide some safe harbor, so that when I
tell my employers, “Yes, you can do this,” they don’t have
to worry about subsequently being fined or found in
violation of the law. That would help a lot. So, your
comment, for me, is very encouraging, because if the
Commission are recommending this -- and I’ll ask if the
Labor Commissioner would have a representative here so he
could kind of hear those discussions -- that would be very,
very encouraging for me. I’d be able to provide better
answers to my members as they call me on this. So, I’m very
encouraged by your comments on that.

COMMISSIONER CENTER: Thank you, Mr. Washington.
And we did invite the Labor Commissioner and their chief
counsel, and we thought they were going to be here today.
Let’s hope they will be at the other hearings or come in
later to listen to the testimony of both sides affected by
the legislation. But the bill’s sponsors are here today.
Maybe either at this meeting or the next meeting, they can
address some of your concerns.

And I think it’s our -- everybody’s feelings on
the Commission to make it as fair and easily enforced for
the employers out there as we possibly can. Now, because
this is a fact-finding, we have no official positions on
your questions, but we will take them into consideration.

Thank you.
MR. WASHINGTON: Thank you.

COMMISSIONER CENTER: The next speaker is Jon Ross.

MR. ROSS: Good morning. Jon Ross, on behalf of the Restaurant Association.

It took me by surprise. I thought I signed it at the bottom, but I’m happy to -- happy to kick it off.

In the interests of time and the audience gathered here today, we have a number of people within the association, hundreds who would like to comment on various parts of this issue. They’re not pounding on the doors here today. We intend to present testimony more fully next week in San Francisco. Following up on what Mr. Washington said, however, we would like to bring your attention to one issue that we think is -- excuse me -- worthy of your early review.

Our interest goes specifically to the various provisions in the bill that ask the Commission to review the manager exemption. One aspect of that is a requirement under the new law that a manager receive two times minimum wage. It’s unclear to us, and it’s unclear to a number of lawyers that we’ve had look at that, when that particular provision becomes effective. The language is couched in terms of your ability to create new exemptions, and it’s unclear whether that requirement kicks in on July 1, 2000 --
or January 1, 2000. We would suggest that as you’re prioritizing your list of issues, considering what to do over the next few months, it’s critically important to those employers who are trying to set payrolls and everything else for January 1 to have some guidance, whether it comes from this board or another, as to what the -- when that requirement kicks in.

Our read is it -- you know, a very strong argument can be made that that requirement takes effect the 1st of July. Given that all the other exemptions and reviews and studies are to take place by that date, for simplicity of bringing employers into a new system, it might make some sense to have all of that happen at once rather than have this happen in stages over the course of the next few months. That’s -- that’s one comment we’d like to add.

Second, we look forward as an association to working with you as you conduct studies and reviews of the manager issue generally. This has been an area of some concern for restaurants. We’re a service industry. The standards that have been in place before on how you determine activities that constitute management activities have been problematic for some of our members. And as we move forward in the next months, we would like to engage in a dialogue on how that standard may be better expressed so that it reflects the reality that our folks see today.
That concludes our comments today, and we will present more testimony next week.

COMMISSIONER CENTER: Any questions from any commissioners?

MR. ROSS: I thought I was out clean.

COMMISSIONER BROAD: Well, no. I just -- Mr. Ross, my question goes to that issue of the January 1 implementation date versus July 1. Now, what the statute says is, “The Commission shall conduct a review of the duties which meet the test of the exemption.” However, it basically says that the Commission may establish exemptions and “where the employee is primarily engaged in the duties which meet the test of the exemption, the employee earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.” It doesn’t -- I don’t think that the Commission has any leeway in that -- that’s a statutory directive, and it seems that it’s effective, in my view, on January 1, as is, you know, the main provision of the bill, you know, 510, saying that, you know, basically, people get time-and-a-half on January 1.

I think it would be wise of you to talk to the Labor Commissioner about their view of it. It’s my opinion that we need to reinstate the wage orders that we are ordered to reinstate as soon as we can do that after January 1, with whatever other interim directive we need to give in
addition to that. But that provision, it seems to me, looks on its face to go into effect on January 1.

MR. ROSS: But the interim -- the wage orders that had existed spoke to a different income test for manager.

COMMISSIONER BROAD: That’s correct.

MR. ROSS: And the new statute speaks to creating new exemptions. Presumably, these are acts that would be taken by this board subsequent to the effective date of the legislation. And so, the question, I think, is are you implementing the old rule and the old standard pending some action to create a new exemption, or does the statute by itself create a new exemption with new terms as of that date?

And at least the preface to that section speaks to this Commission having the authority to create an exemption that contains an element such as two times the minimum wage, so that the -- we’re not here to make a substantive or policy argument on the merits of $2,000. We’re not -- or two times minimum wage -- excuse me. But we do think there’s a legitimate issue as to when that new standard takes effect. And you and I, as lawyers, can sit here and have a debate, and a lot of other lawyers are too, and I guess our point is we ought to be creative in ways that we can, one way or the other, resolve this issue in a rather public way so that a lot of employers don’t have to go to,
you know, the expense of hiring me and you to go out and
tell them how this works.

COMMISSIONER BROAD: So, you want a definitive
answer as soon as possible.

MR. ROSS: Yeah. And we would suggest that -- you
know, that a good answer is to delay implementation of that
particular requirement --

(Laughter)

MR. ROSS: -- until July 1st.

COMMISSIONER CENTER: Thank you. We’ll give you a
fair answer.

MR. ROSS: Thank you.

COMMISSIONER CENTER: The next speaker is Ann
Greenhill.

MS. GREENHILL: I work for an organization in Yolo
County called Summer House, and we provide a variety of
services to people who have developmental disabilities. I’m
also here as a representative of the California Respite
Services Association. We’re an organization of 33 respite
agencies in California, which is approximately two thirds.

COMMISSIONER CENTER: Ma’am, could you bring the
mike a little bit closer? It’s recording.

MS. GREENHILL: Okay. Should I start again?

COMMISSIONER CENTER: No. I just wanted you to
bring it closer.
MS. GREENHILL: Okay.

The California Respite Services Association represents 33 agencies, which is approximately two thirds of the respite agencies in California. And we represent about 3,000 families in the state. I coordinate the respite program for Summer House to seventy families.

And the purpose of respite is to provide care, childcare, so that families can receive occasional relief from caring for their children with developmental disabilities. We provide respite care to children and adults with mental retardation, autism, cerebral palsy, seizure disorders, and other disabling conditions. Our respite workers qualify under the updated Wage Order 15-86 as personal attendants.

I’m here to advocate for continuing the Wage Order 15-86 personal attendant exemption from overtime. If the exemption is not continued, there will be a serious negative impact on our families and the respite workers who provide the care.

By way of background, I want to tell you that all respite agencies are funded by the Department of Developmental Services, and we all receive an hourly rate of reimbursement. This rate is based upon the respite worker’s salary of $6.56 per hour, payroll costs, and also includes an administrative reimbursement. For many respite agencies,
the various rates barely cover our costs; for some, the rate
does not cover our costs and we operate at a deficit, which
is managed by fundraising or other income the organization
has managed to generate.

Although we are constantly advocating for higher
rates of reimbursement, nonprofit respite agencies simply
cannot afford to pay overtime to our respite workers. For
example, my agency receives a reimbursement of $11.80 per
hour, which includes the $6.56 per hour respite worker wage
and approximately $1.00 in associated payroll costs. An
overtime rate of one and a half times the $6.56 salary and
the payroll taxes would cost us most of what we are
reimbursed. It will not take many overtime hours to deplete
our organization’s ability to fund respite services. For
programs that are already losing money, this makes the
situation even worse.

I’d also like to explain respite care from the
family’s point of view. Respite care is provided in the
family home and the hours are as varied as each family’s
need. Respites longer than 8 hours are common, since many
families want to spend more than 8 hours away from home at
one time. Some families use their respite time to go away
for an overnight, which would always exceed the 8-hour
schedule. It is intrusive and disruptive for a family and
their children to have more than one person providing the
care. For respites longer than 8 hours, I know that many families will have concerns about their children’s care, schedules, and routines with more than one person providing the care. Children with developmental disabilities require continuity of care and consistent interactions with the same respite worker. Parents will lose the peace of mind that comes from knowing that the person they leave their children with will not be there when they get home. For respites longer than 8 hours, they will not be able to give face-to-face, specific instructions about their children to each respite worker, and this is very disconcerting for a parent. Parents do not want to rely on several care providers to get the respite care they need.

Because most agencies will not be able to pay overtime, and many families will not want more than one care provider at a respite, we will not be able to meet their needs. Without the overtime exemption, there will be a hardship for parents of children with developmental disabilities.

I also want to address this issue from the respite worker’s point of view. It’s very important for you to know that respite workers are not assigned respite work; they are not required to take a respite job. This is an on-call position, and workers are free to accept or decline the respite job offer. It is not the employer who mandates the
work, and there is no pressure or threat of job loss if they
decide a respite job. Most of our respite workers are
usually doing something else as well. They’re either
students or they have part-time or full-time jobs elsewhere.
They like the flexibility of respite work and the
opportunity to work as many hours as they want when they
want. They fit respite around other obligations. Longer
respites, that is, more than 8 hours, are attractive to many
workers because they can earn what they need or want at one
time. Their choice of working longer shifts is a benefit to
them because it fits their schedules and their financial
needs. Some like the ability to work more hours less often.
If overtime is implemented and respite agencies are unable
to pay overtime, then the respite workers will actually
suffer the economic consequences.

We already have comments in employees in other
programs where the 8-hour daily overtime will have to be
imposed, and many of them are disappointed that this will
eliminate the flexible work schedules they now enjoy. I am
certain that respite workers will also be disappointed.

We hope that you will maintain the exemptions for
Wage Order 15-86. If you don’t, then we urge the Commission
to create a provision which will assure that employers are
able to recapture the costs of overtime through some pass-
through rate adjustment with our funding source, that is,
the Department of Developmental Services.

Thank you in advance for understanding the unique nature of our respite providers’ employment and our families’ special care needs. They’re counting on your support in either exempting overtime or assuring additional support to pay the overtime wages.

COMMISSIONER CENTER: Thank you.

Our next speaker is Connie Delgado Alvarez.

MS. ALVAREZ: Good morning. I’d like to thank you for this opportunity to discuss a little bit about the 12-hour shift and its importance to the healthcare industry.

I wanted to remind the IWC that in the past, after careful consideration, when there was an 8-hour day with the payment of overtime, the IWC, after careful consideration, adopted wage orders that would allow for the exemption for 12-hour shifts in the healthcare setting. These 12-hour shifts are so popular to our nurses and our hospitals, our patients. We can see the popularity of these in the fact that most of the contracts -- or many contracts, union contracts, provide for a 12-hour shift without the payment of overtime.

Despite arguments that 12-hour shifts may compromise a patient’s condition, there is no evidence to prove that, and continuity of patient care has been something that has been very important to our members, our
nurses, and our hospitals.

The alternative workweek schedule came about for the reasons of allowing nurses to have the flexibility to choose a 12-hour shift and be able to stay at home, take care of family needs, and provide for a way of life that was suitable and desirable to them. So, we wanted to talk a little bit about that. We have a nurse that will be testifying later on this afternoon or this morning to talk about how that impacts their lives and how this affects the overall condition for the shifts in the hospital and for the nurses.

12 hours are critical to our industry because we are one of the industries that service the community 24 hours a day, 365 days a year, seven days a week, and we never close our doors. So, it’s easy for our hospitals to shift in two 12-hour shifts, as opposed to any of the other provisions that are available in the bill. We understand that there are some alternative provisions in the bill, but it does really help for the healthcare industry, with that 24-hour staffing need that we have.

And looking about the shortage of nurses in California, if we would have to shift to 8-hour schedules for our nurses, we would have to come up with more nurses available, and we’re not sure that those nurses are there right now. Actually, we’ve been working in a different area
to try to assure that we would be able to get some more nurses.

So, we just wanted to talk to you a little bit today about the -- hopefully, asking you to take careful consideration and see if you might be able to reinstate the Wage Orders 4- and 5-86 that were amended in '93, because this was the allowance that provided for our healthcare industry to have the 12-hour shifts.

I wanted to ask a question, because we have been asking this question before: that if the wage orders that we are going to be reverting to are the Wage Orders 4- and 5-86, amended in '93, we’d like to know whether or not those wage orders are going to be available and how those will be distributed to the employers so that, when the bill becomes effective, we will know and be able to tell our members how to get ahold of those wage orders so that they can post them. I know that it’s a question that’s been asked of the IWC in the past, and we’ve asked it in additional meetings. And I’ve been hearing different variations about when and how those documents will be available. So, that’s a question of clarification we’re looking for.

I’d like to thank you.

COMMISSIONER CENTER: Thank you. And in an attempt to answer your question, we’re looking at all possible ways, maybe making them available on the Internet,
if it meets legal requirements. But that’s -- we’re pursuing that.

MS. ALVARADO: Will there be some notification sent out just as soon as those will be available?

COMMISSIONER CENTER: Yes.

MS. ALVARADO: Okay. Thank you.

COMMISSIONER CENTER: Any questions from the commissioners?

(No response)

COMMISSIONER CENTER: Thank you.

And per Mr. Washington’s request and others, we do have representatives of the Division of Labor Standards Enforcement here now listening, so -- Miles Locker and Tom Grogan.

We appreciate you attending the meeting. Thank you.

The next speaker is Michele Buhlert.

MS. BUHLERT: Good morning. My name is Michele Buhlert, and I’m a staff nurse at Marshall Hospital in Placerville, where my colleagues and I serve the western slope of El Dorado County. Marshall Hospital is the only community hospital between Folsom and South Lake Tahoe.

I appreciate the opportunity to be able to speak to you today about Assembly Bill 60 and how losing the flexibility of the 12-hour shifts will affect not only
myself, but my colleagues in nursing.

Registered nurses dedicate their careers to healing. In these times of shorter lengths of stay for hospital patients, it is imperative that we’re able to maximize the continuity of our patients’ care and best utilize the time that we have with our patients and their families. This is crucial time for teaching patients about their surgeries or their disease processes, their medications, preventing complications, and talking with patients and families about how to optimize their wellness and their enjoyment of life.

The 12-hour shift allows the nurse caregiver the opportunity to bond with their patient and focus on the tasks, the teaching, and the listening that every patient deserves. With only two shifts every 24 hours, patients are spared the constant changing parade of caregivers. Studies have proven that most errors occur within an hour either way of shift change. 12-hour shifts have the potential for decreasing possible errors by one third.

Interviews with patients have shown that they become frustrated with having a different nurse every 8 hours. Being hospitalized and being ill is frustrating enough.

For nurses, being able to spend 12 hours with a patient instead of only 8 allows us to better monitor our
patients’ progress towards a favorable outcome. As nurses, we have dedicated our careers to healing and serving the members of our community. However, as people, we also have lives outside the walls of the hospital.

I’ve made Marshall Hospital my career for many reasons, including the unparalleled support and respect that we, as employees, receive from our managers and administrators, the autonomy that we enjoy as members of the healthcare team, and the flexibility of being able to work the hours that we have chosen.

Flexibility is a quality that drew many of us to nursing. We choose to work three 12-hour shifts a week because it fits our lifestyle so well and it allows us to have a life outside the walls of the hospital.

Many nurses have children at home. Working three days a week allows us the flexibility to volunteer in our children’s classrooms, to meet with teachers, take our children to the park or to appointments, to spend quality time that five 8-hour shifts a week does not allow.

Some of us are also pursing advanced degrees. Working three days a week allows us the flexibility to be successful in our quest for higher education.

Some nurses take care of elderly parents or disabled children. Working three days a week allows us the flexibility to meet outside obligations and
responsibilities.

Many nurses commute to work, some of us very long distances. A nurse who works three days a week instead of five spends 40 percent less time driving and polluting the air.

Working three 12-hour shifts a week allows nurses and their families a better quality of life. It affords us an opportunity to exercise, to travel, garden, swim, ski, visit with the people that we care about, to unwind and recharge ourselves for a demanding career. It allows us to provide better continuity of care for our patients. This is why we, as nurses, have chosen this schedule.

We have opted to forego overtime over 8 hours a day for the flexibility of being able to work three days a week and still earn a full wage. Registered nurses are intelligent and educated professionals. I believe strongly in the right of self-determination and personal choice as to where we work, how we work, and when we work. AB 60 does not provide this flexibility and personal choice we, as nurses, need and want.

I appreciate your time and consideration, and I’d be happy to answer questions if you have any of me.

COMMISSIONER BROAD: I’ve got a question.

When you -- at your hospital, presumably, some time ago, you shifted from 8 hours to 12 hours.
COMMISSIONER BROAD: And was that a sort of a unanimously happy decision among the nursing staff, or were there some nurses who were not happy with that?

MS. BUHLERT: When my hospital changed from 8- to 12-hour shifts, that was before I started working there -- I’ve been at Marshall Hospital a little over five years -- so I can’t speak to the history of the vote. Many of the nurses that work there now worked then, and the nurses that I’ve spoken to in the last few weeks about this overwhelmingly supported the 12-hour shift over the 8-hour shift. My manager is also here today, and I’m sure she could speak more accurately to how that went. But we, as nurses, the nurses I’ve spoken to, feel overwhelmingly that 12-hour shifts not only fit their patients’ needs better, but their own personal needs.

Does that answer your question?

COMMISSIONER BROAD: Thanks.

MS. BUHLERT: I wasn’t there then, would be the short answer.

(Laughter)

COMMISSIONER BROAD: That’s fair.

MS. BUHLERT: The fact that Marshall Hospital has 12-hour shifts was a strong factor in my choosing that hospital to apply to and to stay with. I personally -- I
can only speak for myself -- I would not work at a hospital where 8-hour shifts were mandatory. It’s very difficult, with my lifestyle, and I feel it’s much better for my patients.

COMMISSIONER CENTER: Thank you.

MS. BUHLE: Thank you.

COMMISSIONER CENTER: I’d like to go a little bit out of order now to bring up Julianne Broyles, with the Chamber. She might be able to address some issues that some of the other employers will be testifying on, in her comments.

MS. BROYLES: Good morning, Mr. Chairman, commissioners. It’s a pleasure to be here and having the opportunity to work with you on an issue that’s of great importance to our members and to their workers. We have a side-by-side that I know that probably was provided to you, but to become an official part of the record, we would like to actually hand it in today, because I know that having it officially submitted does give it a little bit more weight.

When we have looked at the issue of the overtime reform over the last several years, it’s been one of conflict, it’s been one of, in some ways, great excitement for both workers and their employers, because when we view the issue, we look at it in a positive way. We have felt from the very beginning that having the ability to, one,
provide our works with the ability to flex hours in a way that lets them meet their worklife obligations in an easier manner, at the same time which does not penalize the employer for doing so, has always been a benefit that goes two ways. And when you look at what the mandate is to the Industrial Welfare Commission, one of which is assuredly to always look out for the best possible impact on the worker, from the health -- their health and welfare -- by wage and hour applications. You also have the additional mandate to ensure that jobs remain in the state, that employers have the ability to complete, and that job opportunities are not lost. We know that that is a very, very hard line for this Commission to have to walk over the next few months as you look at how to implement a very, very confusing law, in some ways, and the technical challenges that employers have in implementing this law, is going to be great. And we’ll be looking to you for the guidance and the information that you will be able to provide.

Like Mr. Washington, we do have probably as many questions as we do the ability to provide information to the Commission at this time. And they have -- something that I don’t think just a plain reading of the statute is going to provide to the employers, in terms of how to set up, gear up, and be able to roll out the new millennium with a brand-new set of wage and hour rules that, in many ways, are
technically very, very impossible to do so without additional guidance on the part of the Industrial Welfare Commission.

The definitions within the bill are certainly very troubling to the employer community. For example, Labor Code 500 defines an alternate schedule as “any regularly scheduled workweek with more than eight hours in a single day,” but that conflicts with later sections of the same bill that define an alternate schedule as something that has been put through the process, the two-thirds secret ballot vote. And what kind of -- our question -- it’s more a question, again -- is there a conflict in those two? Do we now have two definitions of what an alternate workweek is and what an alternate schedule is? And the clarification that the Industrial Welfare Commission could provide on that would be certainly of help to the employer community as they, again, look to provide the flexible schedules where they can, in a manner that works for their workforce, their corporate culture, their business culture in that business.

Additional questions that we do have concern the exemptions. Now, as Mr. Broad had noted earlier, certainly we’re not trying to cry, “The sky is falling,” but we do have many questions because, again, if you do a plain reading of the statute, it says that all employees are subject to 8-hour overtime. And if that is so, then the
question’s been raised on what about family members? How are they treated? What about babysitting performed on a casual basis? How does that now happen?

As you heard from the respite care association, they have questions there on the companionship services that they provide. You have issues dealing with certain truck drivers, some parts of the agricultural industry, and contract workers. We have lots of questions on those, and we’ll be happy to provide as much information as we can to you. But, again, we’ll be looking for answers as well as providing the questions.

You do have, of course, your line of work very clearly set out for you, in that you have to specifically address certain industries, such as the ski industry, the fishing -- commercial fishing industry, healthcare industry, by a date and time certain. However, it’s been troubling for us to hear in the employer community that there are some that believe that we now are going to cover industries that have never historically been covered by overtime rules before and would certainly be, as an employer representative, opposed to, say, now suddenly saying that on-site construction or logging or mining are now subject to the provisions of AB 60, where historically they never have been before.

Additionally, within your -- within AB 60, you
have the issue of the alternate schedules. Certainly Mr. Washington touched on the issue of the menu of choices. Is it one that the employer sets up and the employees choose from? But then further questions when you go deeper into the problem. Certainly, when we talked with workers on -- when we went into the alternate schedules that were available under previous law prior to 1997, one of the problems when you got into the situation, you have the employers going, “Yes, I would love to work an alternate schedule, I would love to come into work only four days a week or three days a week;” however, the problem came around when you had -- choosing that schedule, and then what happens when a significant life change, as you -- a term that I know that you’ve seen in terms of healthcare, but in this instance, it might also be appropriate to view, is to say, “I’ve got -- something has changed, I’m adopting a child, I have a family member that is now ill; I want to now change to a different menu selection,” the process in which an employee is able to do so, or which an employer is able to ensure that he has enough people on a production line, will have to be addressed by the Commission on this basis. We think it’s going to be a difficult task to figure out how to do so.

What we have with other issues within the alternate schedule choice, while you do have -- I believe,
and we’d like just to make sure that that is very clear -- in one part of the bill, it talks about any hour outside of the selected schedule being required to have an overtime payment of time and a half applied to it. So, again, if I have chosen that four-day workweek, and I’ve decided that that’s Monday through Thursday, and I want to work some hours on Friday to make it up, we would like to make sure that there’s clarification that employees on alternate schedules, if they’ve been adopted by the two-thirds vote, have the make-up time available to them and would not be able to have the employer required to pay time and a half for hours that -- on that basis for hours that are being made up, underneath, I believe, it’s Labor Code 511.

Other questions that we do have deal with the legal status of the wage orders. What is the legal status of the wage orders? Questions that -- if they were taken out of effect in 1997, they are no longer legal and valid. What is the status? How -- if we used any of the process that is within those wage orders, what is our legal liability as employers for doing so? Are we subject to lawsuits? Are we subject to being sued and having back overtime or other penalties assessed against us for going by what previous wage orders said, even though AB 60 substantially changes some provisions of those?

Another challenge for this Commission will be how
AB 60 interacts with other leave laws. Now, you have, in many instances, items such as family leave, whether it’s state- or federally-protected leave, under both of those programs, whether it’s pregnancy disability leave, whether it is ADA compliance in order to accommodate somebody’s medical condition, someone with migraines, for instance, someone with severe morning sickness, how does that work? Does it work with the alternate schedules? Does it work with the make-up time? All of those are issues that certainly employers are going to need guidance on.

And the last part of this, again, deals with the make-up time. We are happy to help and in any way comment on suggested forms or notifications on the make-up time or the alternate schedules, and we’ll be happy to present at least examples and samples of what we think might work and work with the Commission and its staff on those issues.

But another issue that you will have to work to clarify is that, under the make-up rules in AB 60, and because it’s very specific, make-up time has to be done within the same week in which it is requested, what are you going to do about that make-up time request that comes in on Friday morning? “I’ve got to get out of here today; I want to make up the time on Monday,” how are you going to deal with that?

So, again, I do not envy the challenges that
you’re going to have to deal with in all of this. Certainly we will have very concrete evidence -- in fact, we plan to submit certainly our previous comments that were given to the Industrial Welfare Commission when the changes were being considered, as well as all of the statistical reports that we were able to compile at that time, showing the impact on wages, showing the impact on workers, and the impact on the competitive nature of California businesses as they were moving through this whole process.

I would be delighted to answer any questions you might have. And hopefully, we’ll be able to work with you in the future on providing the information you may need.

Thank you.

COMMISSIONER BROAD: I read through your chart, and I just had one question. What’s the contract worker issue? I don’t understand that one.

MS. BROYLES: Well, actually, that’s a good question. And we’re not -- again, this is something that we’re not sure of the impact. Now, a previous statute had expressly exempted parties to a contract to waive 8-hour overtime requirements. That was deleted by the new Labor Code 500 -- 510 -- excuse me. And the question is, was it specifically meant to cover just collective bargaining agreements? Was there any issue dealing with contingent or contract workers that the proponents of AB 60 were trying to
cover? And if so, what were they specifically so we can
make sure that, one, we don’t abridge the law in any way
intentionally and knowingly, and then have the knowledge for
our employers, when they enter into contractual
relationships with workers, so they know their overtime
obligations and liability.

COMMISSIONER CENTER: Thank you.

MS. BROYLES: Thank you.

COMMISSIONER CENTER: Our next speaker is Tamme
Booth.

MS. BOOTH: Good morning. I’m Tamme Booth, a
licensed pharmacist working here in the Sacramento area.

Distinguished Commission members and concerned
individuals in the audience, please forgive me for my
inadequacy in public speaking. I’m very nervous, and, to be
honest, I’d like to bolt out the door right now. There are
probably much better individuals who could represent my
profession, but I feel it’s very important to voice my
opinion.

My husband and I are both pharmacists. He is
pleased to work five 8-hour days, and he gets overtime for
anything over 8 hours in a day. I work longer shifts and
enjoy the flexibility that working only four days a week
affords me. I spend less time commuting, can take care of
medical and dental appointments, and enjoy long weekends
without touching my vacation time. I can attend continuing education programs and participate in community and church-related affairs much more readily. Most importantly is the block of family time that my flexible schedule allows me.

At first glance, I had no qualms about this issue. But, as they say, reality bites. Last Thursday, I was informed by my regional manager that, under the new law, I would lose certain benefits. Well, I’m still not happy about the benefits I lost last year. As an assistant manager, I’m certain that I could arrange to continue working 10-hour shifts. My upper management in the Pharmacy Division does consist of pharmacists. They’re still considered professionals in most states; they’re reasonable individuals. But what happens to the other pharmacists? Budget restraints will lean toward the 8-hour workday. This will result in reduction of pharmacists’ hours, an increased workload for those working, and endanger patients in the long run.

I have seen many changes in the pharmacy profession, and I laud the efforts of those who have brought about advancements in the workplace, making it safer for both the care provider and the patient. There are many laborers in this state who work in some pretty horrible circumstances, and they do need protection. We need to ensure that individuals can use the restroom, take a lunch
break, and have a reasonable schedule. I’m just not sure
that this bill is the right mechanism.

Thank you.

COMMISSIONER BROAD: Where do you work?
MS. BOOTH: I work for Wal-Mart.

COMMISSIONER BROAD: And have they told you that
you can’t have four 10-hour days under AB 60?
MS. BOOTH: No, they have not.

COMMISSIONER BROAD: Because you can.

MS. BOOTH: Oh, I can, yes. They assured me that
I could continue the 10-hour workday, but that’s myself, on
management. You can have relief pharmacists, staff
pharmacists, who may be working 8-hour shifts.

COMMISSIONER BROAD: Well, they can work -- they
can work four 10-hour days too, under --

MS. BOOTH: But wouldn’t they --
COMMISSIONER BROAD: -- with an alternative
workweek.

MS. BOOTH: But wouldn’t they have to get overtime
after 8 hours if they’re not considered management or
exempted?

COMMISSIONER BROAD: No. No, they can vote to
have an alternative workweek of four 10-hour days.

MS. BOOTH: And what if they don’t?
COMMISSIONER BOOTH: Well, it they don’t, it would
sort of seem like they probably don’t want to, if they vote
against it.

MS. BOOTH: Right.

COMMISSIONER BROAD: But if they vote for it, then
they would be allowed to have those four 10-hour days.

I’m kind of concerned that the corporate
management of your company is giving you certain
misinformation about what the legislation did and didn’t do.

MS. BOOTH: Well, no. They were clear that I
could continue with my 10-hour day, and they said that the
pharmacists could choose to do so. But I’m concerned about
budget restraints and the other impacts that may come into
effect.

COMMISSIONER DOMBROWSKI: Have they talked to you
about the elections at all at this point, the election
process?

MS. BOOTH: No. I just learned about this
Thursday, to be honest.

COMMISSIONER DOMBROWSKI: Okay.

MS. BOOTH: I tried to read the bill at home, and
it’s very confusing to the average individual, and I’m not
sure I’ve perceived everything.

COMMISSIONER DOMBROWSKI: It’s very confusing to a
lot of professional lawyers too.

(Laughter)
MS. BOOTH: Okay. I feel better.

COMMISSIONER DOMBROWSKI: You’re not alone.

MS. BOOTH: Thank you.

COMMISSIONER CENTER: Thank you. That’s why we’re having these hearings. Thank you.

I think it’s Timothy Lang.

MR. LONG: (Not using microphone) Long.

COMMISSIONER CENTER: Okay. Sorry.

MR. LONG: Good morning, commissioners. I’m Timothy Long, representing here today the California Retailers Association. And by pure happenstance, the focus of my presentation, as contained in the written submission that I’m handing out and that I’ll summarize verbally, deals in part with the pharmacist issue.

The focus of my presentation, as well as the testimony that will follow during the course of subsequent IWC hearings, focuses on the administrative exemption. The IWC has been empowered to define and delimit that exemption. Likewise, the IWC has been empowered to review the wages, hours, and working conditions of licensed pharmacists. During the course of these hearings, we would like to put on evidence that would enable you to conclude that pharmacists, licensed pharmacists, who are engaged in specific duties would qualify under the administrative exemption.

The duties that we have outlined at Page 3 of the
submission focus on those duties that only licensed pharmacists can perform, pursuant to the Business and Professions Code. Now, under the test that exists now with regard to AB 60, or rather, that will go into effect on January 1, the necessary analysis is whether, in fact, exempt administrative employees are primarily engaged in certain specified duties. And you have the task of defining what duties qualify for exempt status. And we would suggest and, again, intend to present both live and written testimony, that licensed pharmacists who are engaged in the duties specified here in this submission should be considered exempt administrative employees.

Those are my comments for this morning. As I said, we will be presenting, over the course of the hearings, testimony, both in live and written form, to flesh out this analysis, and I’d be happy to entertain any questions you might have at this point.

COMMISSIONER BROAD: Mr. Long, how do you -- I briefly read this, what you just handed in here -- how do you reconcile your comments here with the provisions of SB 651?

MR. LONG: Well, SB 651, of course, says that licensed pharmacists, effective 1/1/2000, cannot qualify in California under the professional exemption. The administrative exemption, obviously, is a different
exemption, as is the managerial exemption. So, with regard
to this, the reconciliation is: so long as licensed
pharmacists are engaged in these duties, as specified here,
they would qualify under the administrative exemption.

COMMISSIONER BROAD: And these are the duties that
generally make up the practice of pharmacy.

MR. LONG: These are the duties that require a
pharmacist to exercise independent judgment and discretion.

COMMISSIONER BROAD: So, if we were to adopt this,
would there be any pharmacists that would be not exempt?

MR. LONG: Presumably. I think I’d dare say that
in any given pharmacist -- or pharmacy, rather, that
pharmacist, for one reason or another, and often appropriate
reasons, will not be primarily engaged in all of these
duties. And given that the test is “primarily engaged,”
i.e., spending more than 50 percent of the time, there may
be situations where licensed pharmacists would not be
engaged in such duties more than 50 percent of the time.

COMMISSIONER BROAD: Thanks.

COMMISSIONER CENTER: Thank you.

MR. LONG: Thank you.

COMMISSIONER CENTER: Mark Pawlicki.

MR. PAWICKI: Good morning, Mr. Chairman and
members. I am Mark Pawlicki, representing Simpson Timber
Company. Simpson is engaged in the growing and harvesting
of forests and the production of lumber in Northern
California. I sent in some written comments, which I
believe are included in the record.

We have a narrow issue relative to AB 60. Our
particular issue concerns the issue of a lunch period that,
according to AB -- Section 6 of AB 60, must be offered to
those working 8-hour shifts or longer. In the logging
portion of our business, our employees are commonly
subjected to relatively dangerous working conditions on
steep slopes and wet conditions. They’re usually a
significant distance from an enclosed vehicle or building,
and they eat their lunches in the area where -- right in the
woods where they’re working. They do not want to stop for a
lunch break. They would rather opt to, alternately, eat as
they go and not shutting down the logging operation.

They prefer this because if -- they feel that if
they stop for a half-hour lunch break, they will just get
colder and wetter, and then when they go back to work,
they’re going to be subjecting themselves to relatively --
you know, even more unsafe conditions and risk of personal
injury.

We believe that the law permits our employees to
opt not to take a formal lunch and continue just as they
have been doing. If our interpretation is correct, we hope
that the regulations will make this point clear, that upon
agreement of the employees and the company, a formal lunch break need not be taken for an 8-hour workday. We believe that in our particular case, this approach provides the employees with the flexibility that they need to assure that they are working under the safest conditions.

We do understand that the law does not permit waiving the lunch periods for longer days. If you have more than a 10-hour, you can only waive one of them, is our understanding. But we only -- because of the strenuous nature of our work, we only work an 8-hour shift.

So, that was our only point about this. We hope that the regulations will be clear on that. And if there is an issue, we’d certainly like to hear from you about that.

Thank you.

COMMISSIONER BROAD: Just one quick question.

MR. PAWLICKI: Yes, sir.

COMMISSIONER BROAD: Is it your assumption that the logging industry is covered by AB 60 as of January 1?

MR. PAWLICKI: Well, there seems to be some debate about that, and I -- I don’t know. I really can’t answer that.

COMMISSIONER BROAD: Is the normal workday in logging 8 hours?

MR. PAWLICKI: It is. And many of our employees are union and they’re covered by a, you know, agreement.
But some of them are not. And we only work an 8-hour day because of the strenuous nature. They really can’t work more than 8 hours. And like I said, they just prefer to work the 8 hours, grab a sandwich as they run -- as they go, and not shut down.

COMMISSIONER BROAD: So, the application of the daily overtime system, to the logging industry, if indeed it’s been exempt, would actually not change your operations significantly.

MR. PAWLICKI: I would think not, yeah.

COMMISSIONER BROAD: Thank you.

MR. PAWLICKI: But this new section is added. Section 6 is new to the law, and so I just wanted to make sure it was clear.

Thank you.

COMMISSIONER CENTER: Thank you.

Robert Jones.

MR. JONES: Good morning. My name is Robert Jones, and I represent the Northern California Chapter of the National Association of Computer Consulting Businesses. And I’ve already provided some written information to you. We have -- I’m tempted to say, “Now for something completely different” -- we have a very, very small provision of this law which has a very broad impact on the high-tech industry. There are two words in this law -- they
only appear once -- and that’s “monthly salary.” And they’re in 515(a).

The problem we have with this is not a new problem. This is a problem that we ran into in the industry under the federal law, and which we had -- an amendment was passed to the Fair Labor Standards Act in 1990 that corrected this problem.

Real briefly, the people that we’re talking about are the very highly paid computer consultants who perform system analyst, programming, and other computer-related work.

Excuse me. I’m coming off a cold.

The work that they perform -- these are all people that make between thirty and some make well over a hundred dollars an hour, and they tend to work on a freelance basis. They work on an hourly basis through computer consulting companies who locate the people who have the skills necessary to perform project-based work for businesses that require those computer consultants. And it’s an industry that’s grown up -- I’ve been with it for a long time -- and it’s grown up. In the old days, they were all independent contractors. Then, with all the problems that arose under independent contracting, they became temporary employees of the agencies which found the work for them. And that was all done on a billed per-hour basis.
The reason it’s done on a billed per-hour basis is because the projects in this field are almost impossible to estimate. And that -- we’ve had a number of determinations, by both the IRS and the Labor Commissioner, that the fact that are, in fact, billed hourly, they could still be independent contractors. But there are other problems that arise, including a lot of the companies provide benefits to these people while they are working for them, so they are treated as temporary employees of the consulting companies.

I don’t want to jump through -- too far ahead as to what’s actually done, but basically, a company has a systems problem that they need to have fixed or analyzed or programs readied, and they will contact a company that’s part of the NACCB, who has comprehensive data bases of the skills of individual people who work on this basis. The way that they -- and what they’ll do, then, is they will locate people with the skills that are willing to perform those services, and they will bill for those services on an hourly basis, and they’ll pay the temporary employee, computer professionals, on an hourly basis for the work that they perform.

Now, one thing that has been an issue with the Labor Commissioner from time to time is that since these people have always been found to be exempt -- and they are administratively exempt or professionally exempt, depending
on which Labor Commissioner you end up in front of, but they
are exempt -- but they are paid for all hours worked in
addition to 8 and all hours worked in addition to 40.
They’re basically paid for all hours worked. And so, if
they work 60 hours a week on a project and then move on --
at $50.00 -- and then move on to the next project, that’s
what they do for a living, and that’s what they want to do.

The problem that comes up is that if you require
that they be salaried and paid a monthly salary, which is --
there’s only -- well, not only -- but less than $2,000 a
month -- if they were actually salaried employees, they
wouldn’t be entitled to overtime hours on the basis of the
hours that they worked; they’d be exempt employees. They’d
be salaried, and under some federal statutes, if you were to
pay them straight time or time and a half or any type of
time based on hours, they’d lose their exemption. So, the
only way they could be paid additional time for doing
additional work on a faster basis is that they would have to
be paid that time in the way of bonuses, which couldn’t be
tied to hours, but would have to be tied to profits. And it
would make a real nightmare for them and the companies.

Now, like I indicated, this isn’t something that’s
come up for the first time here. There’s never been a
salary test, a salary basis test, under California law. We
had the remuneration -- which no one can pronounce,
including myself -- but that there was a minimum of $1,150 a month. But under the federal law, there’s a weekly salary basis test under the Fair Labor Standards Act. And in 1990, when this first came to light, that said that these people would not be able to work on an hourly basis under the federal law, Congress amended the Fair Labor Standards Act to create -- and it’s a little confusing, and I provided you with copies of the statute -- but to create what is commonly called the computer professional exemption. And that exemption says that if they qualify as a systems analyst, programmer, other related computer technologies, and they’re paid at least $27.63 an hour, then they can be paid on an hourly basis and they’ll be considered computer professionals.

And that’s what we’ve asked and what I’ve given you in the language I -- as the last page of the three-page presentation that I gave to you. That is precisely the same language which exists under the Fair Labor Standards Act, and we would like to recommend that this Commission adopt an exception which is exactly the same -- under 515(b), by the way, is -- we think that’s where the authority is to do this, of the Labor Code -- is that you adopt that exception, saying that if you meet the criteria to be a computer professional and you’re paid more than $27.63 an hour, that you can be paid on an hourly basis.
And that’s all we’re asking for. Those two words, by the way, the “monthly salary” test, the “monthly salary” only appears once in the bill. I can’t find it anywhere else in the legislative history, and I can’t find where it was discussed. Now, perhaps it was. But the only place that I can find it is in 515(a). And if it said “compensation,” we wouldn’t be here today. But since it says “salary,” and given the nature of the history of the Fair Labor Standards Act salary test, this is something that’s going to have to be corrected.

One of the -- the last point I wanted to make was, this doesn’t just impact the workers themselves, the professionals. What it impacts is the industry itself, because most of these companies that request this type of work being done, they can have this work done anywhere. In fact, the companies in California often bring people in to work on projects for people in Tennessee and Texas and Nevada. And who knows where this person’s actually doing the work, because all they have to do is look at the system once -- generally -- and then they can go ahead and prepare the code anyplace they want, e-mail it, and if they do that out of a state other than California, they would be entitled to be paid straight time and overtime for all hours worked.

And I’m here if you have any questions on this.

COMMISSIONER DOMBROWSKI: Not so much a question
as a comment. The situation you described, I find personally -- because in the early ’80’s -- not in the computer industry, obviously, but in a PR agency, that’s how I was working. And I think the issue he’s bringing up, unless I’m missing something, has some broader implications to some other -- it isn’t just the computer industry. There are a lot of people who do this kind of consulting, probably in the entertainment industry and others, that we’re going to need to think about.

So, I guess, for the public record, whoever has those kind of thoughts about that should bring it to our attention.

MR. JONES: The one comment I’d like to make on that is that these -- all other industries, other than this one, with some really strange exceptions, like people who make wreaths at Christmas and so forth, they’re all covered under the Fair Labor Standards Act. And so, if they -- but the only one that provides an exception in the Fair Labor Standards Act for hourly professional is the computer professionals making more than $27.63 an hour. So, others would still be subject to the federal law.

COMMISSIONER CENTER: On the same issue, probably consultants dealing with AB 60 too would be affected.

(Laughter)

COMMISSIONER CENTER: Thank you.
MR. JONES: Thank you very much.

Kelly Watts.

MS. WATTS: Mr. Chair and members, I’m Kelly Watts, with the American Electronics Association. I’d like to thank the Commission for this opportunity to speak, although I have a major cold, so I’m going to make it very brief.

There are three issues of clarification our members have requested, and the first one deals with the voting process. We would like to see clarification on the voting process that will be used for the implementation of alternative work schedules. We’re supportive of a simple, easy to implement process that allows maximum flexibility for employees.

One element of this process is the definition of a work unit, and we would like to see the work unit defined by supervisor and shift to provide for maximum flexibility for employees.

The second issue relates to the hourly rate for alternative work schedules. And assume that since 1997, an employer has kept a consistent schedule of 12-hour days for its manufacturing employees, the schedule was not established pursuant to an employee vote or a plan filed with the Labor Commissioner, and before 1998, the employer did pay daily overtime. When the law changed to weekly
overtime, the employer added an hourly premium. Now the
employer intends to comply with the new law by paying the
daily overtime. May the employer eliminate the hourly
premium without violating Section 511(c) in AB 60?

And thirdly, we’d like to discuss the issue of
make-up time. In the interests of preserving flexibility
for employees who unexpectedly need time off toward the end
of a workweek, for example, on a Friday, what is the
protocol for making up the time, because they will have no
opportunity to make up that time during the same workweek?

Also, we understand that an employer may not
solicit employee requests for the make-up time. What would
be the appropriate method for notifying the employees of the
lawful request procedure?

And finally, in light of the new law and the
sufficiency of electronic signatures, may an employer have
the option to require that such requests in regards to make-
up time be digital or in writing?

And in sum, those are some brief issues that we
wanted to bring to your attention. And we’ve submitted some
more testimony and detail for your information.

COMMISSIONER CENTER: Any questions?

COMMISSIONER COLEMAN: I had a quick question.

Kelly, are there any examples of employers that
have used successful voting models that we could use as
we’re considering how to write this up? Can you --

MS. WATTS: Yes. We do have several members who have attempted to use the voting process in the past. It hasn’t been that successful, but I would be glad to get that information to you.

COMMISSIONER COLEMAN: If you have any that they like over other ones, that would be, I think, useful.

MS. WATTS: Sure.

COMMISSIONER COLEMAN: Thank you.

COMMISSIONER BROAD: I had one question. Someone earlier raised the issue -- oh, Juli Broyles -- on make-up time in the following week. I don’t think that that’s a matter that’s pre-empted by federal law, because what you’re doing is saying that a person’s going to work more than 40 hours, potentially, in the following week. And I don’t think that the state has the ability to regulate -- regulate that area. If somebody works more than 40 hours a week, they get overtime under the Fair Labor Standards Act, so that’s why the statute requires that the make-up time be in the existing workweek, for that reason.

So, there may be an issue there that’s simply -- the State of California cannot resolve.

MS. WATTS: Thank you.

COMMISSIONER CENTER: Lowell Taylor.

MR. TAYLOR: I am Lowell Taylor. I’m a registered
pharmacist and employee in the State of California for the last thirty years. And I’m here with concerns about the law that’s coming to pass in January 1st.

Excuse me if I’m a little nervous when I’m talking to you. I haven’t done this before, so --

Anyway, what we have now in the company that I work with is a choice, a choice that we can either be an hourly associate, paid by the hour, overtime if we worked over 8 hours or over 40 hours per week, and we also have the choice, we can be a salaried employee, which we can work longer hours per day and have fewer shifts per week. And it’s sort of a rotating thing, where we can work less hours one week and more hours the next week. And this way, it gives us -- we feel we have a better chance of having more family time at home. We feel that we have a better work relation in the stores because we work -- and we have 12 hours, so that we’re open in the store, and when we have worked 10-hour overlap, we have a better overlap in working, and which gives us less stress time, and we also have better customer service.

And I’m just afraid that, come January the 1st, that we’re going to be losing this and we’re going to be losing the choice that we’ve had now. And we’ve never had this choice before, where we could have the choice of being either an hourly or a salaried employee. And I think this
is going to be taken away from us, and I’m just wondering if
this is what’s going to happen on January 1st, if we are
losing this right.

COMMISSIONER DOMBROWSKI: We hope not.

I have a question. Of your associates, do you
have any sense of how many choose to work the manager or the
exempt status, choose that route and the longer hours versus
the 8-hour?

MR. TAYLOR: Well, I can only say -- you know, the
ones that I work with, I’d say probably 90 percent of the
pharmacists that I work with have chosen the salaried
position over the hourly position. Mainly, most of the
people that want to work the hourly positions are the ones
that are part-time and just -- just want to work a few hours
per week or so. The benefits to us are -- far outweigh
being in a salaried employee than they would be if we were
hourly. We would be taking a step backwards if we would go
back to the hourly position.

And when I say this, we have more benefits, like
we have paid time if we’re out sick. We’re completely paid
for it, and it doesn’t matter if we’re out two or three
weeks. I have a pharmacist right now that’s out with
appendicitis for two weeks, and he hasn’t lost a day’s pay.
If he were on the hourly, this would be different because
it’s a built-up time of sick leave and things over the year.
And there’s just so many more benefits for us.

And the time that we have at home is much more now than it was before, when I used to work just a five-hour — I mean an 8-hour, five-day-a-week job. And I think the benefits are much better for us now that we’re in the situation that we are now.

COMMISSIONER DOMBROWSKI: Thank you.

MR. TAYLOR: Okay.

COMMISSIONER CENTER: Thank you.

Julie Garcia.

MS. GARCIA: Hello there. My name is Julie Garcia. I’m from Rialto, California, and my purpose of coming to the committee members is to show the approval of the flexible workweek that are given.

We’ve had — well, I’ve worked for thirty years, since graduation, on eight-day rotation, or 8-hour rotation of seven days, which doesn’t give you very much time at home. It’s seven days off in a 24-hour workday — or workday week. That’s thirteen rotations. So, if you sit there and you do the math, it’s seven times thirteen that I have days off. With the flexible workweek, we get fourteen workdays that I have off, and I work for fourteen.

What I’m asking for is consideration to allow us to continue this way. We voted. You were asking about how we came to go to the flexible? We were allowed. We brought
this up to the company because we knew one of our sister
plants in Kentucky went to it.

COMMISSIONER DOMBROWSKI: A quick -- which
industry are you from?

MS. GARCIA: Paper industry.

COMMISSIONER DOMBROWSKI: Oh, okay.

MS. GARCIA: It’s a factory.

COMMISSIONER DOMBROWSKI: Okay.

MS. GARCIA: And what it is, is they were doing it
back east, and some of our people said, “Why don’t we take a
look at it?” And enough people said, “Well, let’s take a
vote.” Well, we voted. Not everybody was in favor for it.
I think, out of 84 people, 18 said, “No, we’re not really
interested.” So, the majority went, and we said, “Let’s try
it.” We tried it. At the last count, when it was -- the
six-month trial was over, only eight said they didn’t want
the flexible. We went ahead and went on the 12 -- or the
flexible hours, 12 hours, and we’re very happy with it.

The people who are working there are happy. It
gives us more days off, which we can have our family lives.
We have the opportunity to be with our families, to
maneuver, to rotate our days off. If somebody has a day
that they need off on a certain Friday, you can get somebody
who’s working on Thursday and rotate it around. They’ve
given us a lot of opportunity to work with the flexible
And, you know, if you sit there and you do the math, seven times thirteen, or fourteen times thirteen, how many days do you have off with your family? We work holidays. We’re like the police officers; we work holidays, our birthdays, our kids’ birthdays. But if we are allowed to have those fourteen days off, we have an opportunity to be with our families more time. And those days are important.

And it’s kind of like any other thing -- if you sit there and you look at the numbers, it helps us. It really does, to be on this flexible schedule. And we did vote, and it did fly with the majority of the vote. And it wasn’t just a few people pushing it. A lot of people wanted it. We’d like to have the opportunity to be the exception and stay on it, stay on the 12 hours for our particular industry and the people who would like to stay there.

COMMISSIONER BROAD: I just was a little confused. What’s your schedule? It’s --

MS. GARCIA: Okay. My schedule, if I’m on an 8-hour rotation, you’re looking at a 28-day cycle.

COMMISSIONER BROAD: Okay.

MS. GARCIA: I work 21 days, and I get off seven. On a flexible schedule, the same 23 days, I get 14 days on and 14 days off.
COMMISSIONER BROAD: Okay. But, I mean, what’s your actual week -- so, you work a week on and a week off, or two weeks on, or --

MS. GARCIA: No. Actually, what it is, is if I’m on a seven-day rotation for an 8-hour shift, I work seven days in a row.

COMMISSIONER BROAD: For 8 hours a day.

MS. GARCIA: For 8 hours a day.

COMMISSIONER BROAD: Okay.

MS. GARCIA: And then I get two days off. Then I work. And then -- that’s on graveyard. Then I get seven hours (sic) in a row working swing, with one day off. Then I work seven days in a row, and then I get four days off. And this is in a -- this is in a 28-day cycle. So, you go from graveyard to swing to days.

And if you try doing that for 29 years, like I have, it’s very hard to get your body used to it.

COMMISSIONER BROAD: I bet.

MS. GARCIA: So -- it is. It’s very rough.

And what we’re looking at is, with the flexible schedule, we are now working two shifts, and we’re working three days in a week, then four days in a week, then three days in a week, and then four days in a week, days and nights only. So, your chances are being able to be with your family more often. And that’s what we’re really
looking at.

We do get paid time and a half for Sundays. So, any time that we’re away from our family on Sundays, which is two days out of the month that we work Sundays, and then we have two days out of the month on Sunday we don’t.

COMMISSIONER BROAD: What’s confusing me is I don’t -- in your old shift, I don’t understand why you weren’t receiving overtime for hours worked after 40 hours in a week.

MS. GARCIA: On the old shift?

COMMISSIONER BROAD: Yeah.

MS. GARCIA: Because it depends on when the week started. The graveyard shift starts on Wednesday. It’s the manipulation of the days --

COMMISSIONER BROAD: I went into law because I’m no math whiz, but --

MS. GARCIA: It’s a manipulation of the days.

Okay. What happens is, you start your graveyard on Wednesday. Then you work seven days. So, you go Wednesday to Tuesday.

COMMISSIONER BROAD: Yeah, but then you worked 56 hours, is what you were telling me. You worked --

MS. GARCIA: In a row, but in two different work periods.

COMMISSIONER BROAD: Oh, I see.
MS. GARCIA: You got it, right?

COMMISSIONER BROAD: Yeah. Thanks.

MS. GARCIA: But, see, the thing is, on this -- on fourteen days off and fourteen days on, we're actually better off because we're working three or four days a week, and we do get our paid time and a half for Sundays, no matter if it's only our third day. So, this is where it benefits us too.

And for some reason that they wish to have us overtime for a meeting, a safety meeting, something that's necessary for our health -- we have safety meetings, quality meetings -- we do get double time for after 12. And this is something the company has given us without a problem.

But one of the things that was a big issue was the attendance when we were on 8 hours. My plant does not shut down. I personally am in charge of electricity. The plant doesn’t run without electricity, so the attendance is very, very difficult. And you’re working seven days in a row, it’s hard on your body, especially if you’re on nights for seven days in a row and -- I have three children -- have you ever tried to keep three children quiet while mom’s trying to sleep? It doesn’t happen. You hear them come in, you hear them go out.

But on this flexible schedule, you’re only working three yards of graveyard, the night shift, in a row. So,
you get a little more resting in there. And it -- what I really want to do is prove to you that the flexible schedule works for the people who want it. And the people who have voted for my company, the employees, they voted to accept the flexible work schedule.

And your comment about the numbers? Only eight people at the end still wanted 8 hours. Everybody else, even those who did not want it at first, they went ahead and changed their vote. And the right to choose is the most important thing, and how we get to do our work schedule.

You’ll never believe our work schedule!

(Laughter)

MS. GARCIA: But it has to do -- just like the police officers. But the police officers, they get to schedule themselves completely on night shift. We can’t; we have to rotate.

But, like I say, the whole main purpose of coming here is to at least encourage the right to the flexible hours. It will help us immensely.

Thank you.

COMMISSIONER CENTER: I can’t read the first name, but it’s either Ms. or Mr. Washington from Inland Paper and Packaging -- it looks like Mr.

MR. WASHINGTON: (Not using microphone) Tyrus.

COMMISSIONER CENTER: Tyrus. Okay. I’m getting
old and I don’t see so well.

MR. WASHINGTON: It’s still morning -- good morning. My name is Tyrus Washington, and I am the human resource manager at the plant that Julia works at. And I’m going to echo some of her sentiments as well as add a little more explanation as to how the schedule works.

I did fax you a copy of a letter with a copy of the schedules attached to it. If you don’t have that, I have about three copies here I could leave with the Commission as well.

COMMISSIONER BROAD: We’ve got a lot of paper here.

MR. WASHINGTON: I understand. I have three copies here.

Just to give you a little background on the work schedule that our employees work, prior to 1998, employees were on an 8-hour shift schedule. And that’s a 28-day rotation cycle. In those 28 days, they worked 21 out of those 28 8-hour days. The workweek is from Monday through Sunday.

Prior -- just prior to 1998, November of ’97, when we understood that the IWC had changed the wage orders to allow for work over 8 without the payment of overtime, employees approached us and wanted to try the 12-hour shift rotation. At that time, we took a vote. We told employees
that before we’d go to that, we’d take a vote, because we understood that everybody did not want to go to a 12-hour rotation. Therefore, we took a vote in November of ’97. The count of that vote was 58 to 26, I believe, out of 84, 84 affected employees.

We did that on the understanding that we would go on a six-month trial to make sure that everyone liked it and wanted to stay on it. Just prior to the end of the six months, sometime in May of ’98, we took another vote. And the count for that vote was 77 to 7 in favor of the 12-hour shift rotation. And we have been on that ever since.

And employees were given a choice, although we didn’t have to have a vote or anything under present laws. Employees were given a choice to vote on that.

Now, as we understand it, due to AB 60, we will have to go back to an 8-hour shift. The reason for that, the company can’t afford to pay overtime on a daily basis on a 12-hour shift. To try to quantify just a little bit, if you go from an 8-hour shift to a 12-hour shift, that would increase our labor cost some $532,000 per year. From the shift we’re presently on to a 12-hour shift paying time and a half after 8 in a day, that would increase the labor cost an approximate $440,000.

Well, the main thing we wanted to express here is that the employees wanted the choice and they were given a
choice to go to the alternative work schedule of 12 hours in
day. It’s not necessarily a 40-hour workweek because one
week’s 36, the following week’s a 48-hour workweek. We pay
time and a half after 40 in a workweek, and we still pay
double time after 12 in a workday, even though that’s not
required at the time.

Personally, it would make my life a lot better if
we went back to the 8-hour shift, but it’s not my job to try
to make my life easier. This is strictly a morale issue.
We did increase our labor cost when we went from an 8-hour
shift to the 12-hour rotating shift we’re on now. Labor
costs increased some 2.1 percent. In view of that, if we
are forced to go back to an 8-hour shift, the employees
would receive a reduction in earnings for working the same
hours. In each 28-day rotation, employees work 168 hours.
On an 8-hour shift, they receive 180 hours times their
straight pay for those hours worked. On the present shift,
they receive 184 hours of their regular rate of pay for 168
hours worked.

So, I don’t think this bill is really fair to
these employees who have voted. They were given an
opportunity to vote even though it wasn’t required. Right
now, for myself, it’s really a lot going on. I’m getting
calls every day, and Julie and everyone else are knocking on
my door, “What are you going to do about this 12-hour
shift?” Can we do anything? And we are almost at the end of the road here.

So, I’ll just ask the Commission to take a look at it. I don’t know if you have the power or not to make an exemption for this industry or this organization in Ontario, California.

COMMISSIONER CENTER: Any questions?

(No response)

COMMISSIONER CENTER: Mark Vegh.

MR. VEGH: Good morning. I’m Mark Vegh, employment counsel with TOC Management Services. TOC is an employer association with member companies throughout California and the Pacific Northwest.

On Friday afternoon, I faxed down our written comments. I believe you have those.

Just very briefly, my understanding of the purpose today is for you to gather information on what the issues really are. So, I’m not going to get into a lot of depth on any substantive issues. I believe that that opportunity will come later. But I do want to point out some -- just a very few issues -- the previous speakers have already pointed out some -- a couple of others that I want to point out that haven’t been mentioned thus far as well.

I believe that the need for clarity, and a prompt need for clarity, is critical. I’ve been holding a series
of briefings, hour-and-a-half briefings, throughout California thus far on AB 60 -- part two to follow next year when the dust settles -- but I’ve had a lot of questions, so I have -- as well as over the phone, just in my job. So, I have a fairly clear idea on what some of these issues are of concern to employers. And I’ve tried to give as many definitive answers as I can. Unfortunately, there are a number of areas where reasonable minds would differ. And most employers want to be risk-averse and will use their best guess, which is all they can do at this point, and then an outcome that is conservative so that they don’t run the risk of these potentially high civil penalties and personal penalties as well under AB 60.

The meal period issue has already been mentioned this morning. I believe that the Commission should clarify that the provision, the exception for an on-duty meal period, still exists. I think that’s still an open question, even though I’ve heard comments in the last couple of weeks from people in authority that it will survive the first of the year. But I believe that’s still somewhat of an open question at this time.

There are some great reasons for continuing that when the dust clears by the middle of next year. For example, it is a fairly narrow exception, always has been. It applies only when the nature of the work prevents the
employee from being relieved of all duty and for business
necessity, and it has to be agreed upon. So, I don’t really
see a harm that’s existed through the years with that --
with that on-duty meal period exception.

Somebody already brought up the issue of the
seventh day of work and the difference in the language.

I’ll just very briefly add my two cents’ worth on that. I
think, clearly, the -- for the time-and-a-half premium to
apply for the first 8 hours, it has to be the seventh
consecutive day in the week. I think that’s clear under the
language of AB 60. What’s unclear is the double time
language that says over 8 hours is double time if it’s the
seventh day of the workweek. And therein is the issue.

I think that needs to be clarified. And there can
only be one reasonable answer, and that is that what’s
intended here is what we had before 1998: the seventh day
premium applies, whether it’s time and a half for the first
8 or double time over 8, when it’s the seventh day of work
consecutively. I think that’s the only reasonable outcome,
but there is still that open question because of the
language in AB 60. To say otherwise would also be an
anomaly because it would mean that if somebody’s on vacation
or otherwise not working for the first six days, they come
in on the seventh day of the week, the first 8 hours is
clearly straight time, and then if they work over 8, it
suddenly jumps to double time. And to my knowledge, that
would be unprecedented, and that’s not the intent.

The exemptions, several people have talked about
specific exemptions and some of the uncertainty with those. The question was asked a few speakers ago, to Mr. Pawlicki, about whether the exemption for logging, and on-site mining and construction as well, still will survive come January 1st. I think the prudent answer, what I’ve been telling employers, is it will not, because my understanding is that that has been an exemption through the years simply because there’s no wage order that covers those occupations. So, that’s my opinion on that. I would like to see that exemption continued, which you have the authority to do. I would like to see, hopefully, some proposed rules, and then I would comment further on the policy reasons for continuing those exemptions. There are some special reasons for those exemptions.

Another area which has been mentioned briefly, certain intrastate truck drivers. My understanding from the comments just this morning is that those and the other miscellaneous exemptions will probably be continued beginning January 1st, the other exemptions such as personal attendants and the other miscellaneous ones.

Also, there were some comments regarding 12-hour shifts. Mr. Washington, the first speaker, brought that up.
And I would also like to see some relief, some exemption that would apply to those companies and, in fact, some industries that do go around the clock and really have to have the 12-hour shifts. That’s often driven by business necessity in some manufacturing establishments. There are also some industries, such as -- just what comes to mind, co-generation or power plants that traditionally pretty much always have the 12-hour shift, often three days on or a three-day workweek and followed by a four-day workweek. So, it would be nice to see some proposed rules to comment further on that would give some relief to those businesses and those industries.

Finally, a couple -- one other definition which I think is -- well, it’s brand new, and it’s unclear, dealing with alternative work schedules, the term of “reasonable efforts” that employers have to put out. If an employee comes to them who’s unable to work an alternative work schedule and who is eligible to vote in the election, employers are required to make reasonable efforts to accommodate such an employee. Questions come up. For example, when does that duty arise? In other words, when is an employee unable to work? What kind of notice has to be given to the employer? And then, finally, probably most glaring, what do “reasonable efforts” really mean? It would be real helpful to have some guidance on that and some
definition that we could comment on further.

Those are my comments on the issues right now.

I’d be glad to answer any questions.

COMMISSIONER BROAD: What’s your opinion -- this is sort of a question I have, and I’m just not sure at all of the answer -- but what’s your opinion about what is the ability of the Industrial Welfare Commission to act in some of these other areas, these sort of ancillary areas, where it’s not specifically mentioned that the IWC can act without wage boards? And my assumption is that the normal petition process would apply, and we would have to go through wage boards, that we couldn’t engage in some expedited process of granting exemptions, sort of willy-nilly, as part of the implementation of AB 60.

MR. VEGH: I’d be leery to give a definitive answer on that off the top of my head, but I do think you have authority to certainly continue, eliminate, or revise any exemptions that are here now. And it would be helpful to see some proposals, for example, on the 12-hour shift, relief for the 12-hour shifts.

I could look into that issue and provide written comments, though, on what I believe the bounds of authority are.

COMMISSIONER BROAD: Well, I’d appreciate that because, for example, let’s say that you’re correct and that
as of January 1, these five industries that were -- that are in this peculiar situation where they were exempted by custom by not -- or practice, but not -- but there is no exemption in the wage orders, if, on January 1, they become covered, it seems to me that if those industries wish to have exemptions, they would have to petition the Industrial Welfare Commission to grant those exemptions, and that the IWC would have to go through the process of convening wage boards in the normal course of business, as opposed to these particular expedited responsibilities we have, you know, to deal with specific questions without convening wage boards, for example, with respect to pharmacists or back-stretch employees at racetracks and healthcare and so forth.

So, I would be pleased to know what, you know, your opinion is, as someone who deals with this.

MR. VEGH: I’ll be glad to do that and give a more thoughtful response. I think that those are some unique exemptions, and I will look into what our opinion is on your bounds of authority and what some options would be for those industries.

COMMISSIONER CENTER: Thank you. What types of employers do you represent?

MR. VEGH: We primarily, historically, have represented wood products related. We now represent some totally non-related manufacturing and even some non-
manufacturing members. But by and large, it’s still those
associated with wood products.

COMMISSIONER CENTER: Thank you.

MR. VEGH: Thank you.

COMMISSIONER CENTER: Jan Ross.

(No response)

COMMISSIONER CENTER: John Dunlop.

(No response)

COMMISSIONER CENTER: We’re wearing them out!

(Laughter)

COMMISSIONER CENTER: Larry Nelson.

(No response)

COMMISSIONER BROAD: The early lunch group.

(Laughter)

COMMISSIONER CENTER: Yeah, a break.

Vic -- and I can’t -- is it Nard?

(No response)

COMMISSIONER CENTER: And Daniel McCarthy, it
looks like, from the truckers.

MR. SWARD: Thank you. I’m Vic Sward, currently
the president of the California Trucking Association and a
small business owner. Thank you for allowing me to speak.
The California Trucking Association represents
trucking companies in all areas of California. They are
from one truck to companies as large as UPS. As Association
president, I’ve created a special task force, chaired by
Dennis Altenaugh, to involve each of our thirteen units that
are located throughout California and to advise them of all
aspects of the hearings today and the effect this will have
on the individual business and employees.

Because of the late notice that we got or received
on this, this morning was the first chance we had to have a
meeting. And we will be having subsequent meetings involved
with this with all of our members.

One thing that I -- a point I want to make -- and
there’s a lot of eloquent speakers here today that have said
pretty much what -- we’re on a fact-finding mission. As we
compete in a global economy, and we are a service industry
competing with Mexico and the interstate carriers that come
into the California market, and I don’t want to hurt our
employees, and I don’t think our employees want to be hurt,
by some law that we -- that is different from our
competitors throughout this industry. So, as you take into
this, we have had exemptions, and we’ll need to look at them
thoroughly, but right now we don’t have any other comments
that I’m aware of.

So, if there’s any questions, that’s what I have
to --

COMMISSIONER CENTER: I apologize for trashing
your name there.
MR. SWARD: That’s all right.

COMMISSIONER CENTER: I need to either get bigger type or better glasses.

MR. SWARD: It’s been trashed worse than that before.

Thank you.

COMMISSIONER CENTER: Thank you.

Daniel McCarthy.

MR. McCARTHY: Good morning. My name is Daniel McCarthy. I’m a lawyer representing the California Trucking Association, and my comments will be very brief because President Sward basically stated the California Trucking Association’s position.

It’s our understanding that these hearings will continue into the next year. CTA will be present and participating in all the hearings, and we’ll do our best to bring any assistance we can to the Commission in its work.

COMMISSIONER BROAD: Mr. McCarthy, I’d like you guys to think about the exemption. Obviously, I don’t believe it’s -- the truck and bus driver exemption, it’s just not really affected by the bill directly. If someone wanted to change it, they’d need to petition the Commission to change it. Nevertheless, it’s an issue that’s been close to my heart for a long time.

And I’d like -- I believe that the hours of
service rules are often observed in the breach, and perhaps
the Commission should consider a rule that requires the
payment of overtime after any -- any hours after those which
are lawful to work. And I’d like the Trucking Association
to think about that, because, currently, that would mean
after 80 hours in eight days or 15 hours on duty in any
single day. And since it would illegal to require employees
to work those hours, perhaps a further disincentive towards
violating those important safety laws would be the payment
of overtime in excess of those hours.

MR. McCARTHY: Yes, Commissioner Broad. We’d
certainly consider that. Safety is our ultimate objective
in the trucking industry.

COMMISSIONER CENTER: Thank you. You might
consider a guillotine too.

Teresa Miller, please.

MS. MILLER: I’m Teresa Miller, executive vice
president of the California Society of Health System
Pharmacists. We represent pharmacists that work in hospital
and other health system settings, as well as home health
settings, managed care, clinics, and ambulatory care
settings.

A majority of our members who work in -- and most
of them do work in hospitals and integrated health systems
-- do work in a clinical role, and in that role are involved
in specific patient care functions, including things such as pediatrics, neonatal, intensive care, oncology, and critical care. And while we are sympathetic to the concerns of some of our colleagues in the retail setting, which was the impetus for the SB 651 and the removal of the professional categorization for purposes of the Labor Code, because of some of the situations that those colleagues found themselves in with respect to not being able to take lunch breaks and those things, which we, of course, support, we remain concerned about the impact that AB 60 -- actually, SB 651, which is directly related to AB 60, will have on our pharmacists being able to continue to provide the quality of patient care services that they have been able to in the in-patient setting.

Some of the reasons for that, the impact that we predict, is the fact that, as has been mentioned by a number of the other speakers that have already spoken today, many of our members have 12-hour shifts. They have the alternative workweek schedule such as the seven-day-on, seven-day-off, and those kinds of things. And a lot of the reason for that is because we have 24-hour staffing of hospital pharmacies and those sorts of things.

We would like to work with the Commission and are interested in some sort of exemption that might provide for 12-hour shifts for members practicing specifically in those
kinds of situations so that we continue to provide those
kinds of services in the in-patient setting.

Also, there was an interesting comment made
earlier in terms of clarification of what meets the test for
administrative functions for purposes of exemption. And
that would be something else we would be interested in
pursuing, in terms of the pharmacists who are performing
certain types of functions and would qualify under those
criteria, so that they would be able to use these flexible
scheduling and those sorts of things.

If you have any questions, I’d be happy to try and
respond to those. And we will be participating in the
future hearings.

COMMISSIONER CENTER: Thank you.

MS. MILLER: Thank you.

COMMISSIONER CENTER: Les Clark.

MR. CLARK: For the record, my name is Les Clark,
vice president of Independent Oil Producers Agency. And we
too are in a process of putting some other comments
together. Probably those comments will be forthcoming at
your San Francisco meeting.

We were under the understanding that we weren’t
even a part of this. We were under a term of exclusion in
the past; we weren’t even part of the wage orders. And now
we were told by -- potentially, by one of the legal folks
that happened to come our way, that not only were we a part
of it now, but we might be a part of it retroactively, which
really concerns us.

So, we’re looking into providing more information.
And I think one of the things that is of interest to me that
you’ve talked about already is the balance of authority,
because if we were excluded in the past, I’m not sure how
that works back in. I would assume we would have to
petition for an exemption, as you so suggested. So, those
are some -- that’s one of the things we’re going to look at.

We too -- and the Manufacturers Association,
rather than go all back into it, I think he made a very good
presentation as the 12-hour shift. The Independent Oil
Producers Agency, we represent mom-and-pop operators, and in
that representation we have well pullers and well drillers.
Those are 24-hour operations. For me to go tell a well
puller we’re going to take away his 12-hour, you know, shift
is not going to be good, because those folks really like
that. And this was sort of -- got me -- I mean, our
employees are happy with 12-hour and employers are happy
with 12-hour, but now we’re trying to defend that.

The quality of life, I think it’s been mentioned
several times, the ability to have those long days off after
you’re working, and I would well pulling and well drilling,
I’d put it up there as just as hard work as any other folks
that have mentioned their occupations.

And also, we’ve met with -- realizing all of a sudden, in the last week or so, that we might be a part of it, we met with -- we’re going to meet with Assemblyman Flores Wednesday. And he asked me to relay to you all that whatever takes place in that meeting, that he’d like to have that -- he’ll send it up and would like to have that incorporated as part of the record and testimony. So, he asked if that’s okay.

Now, the other thing, there’s an urgency here without something. We’ve got -- the shift dates, as far as your hours of work, this is going to have to be done by December -- probably 15th, in order to make sure that you have your schedule in place. And I’m not quite sure how this is going to play out, whether it’s going to be three 8-hour shifts or we’re going to continue on with the 12-hour shift. So, there’s an urgency -- I don’t know how the petition thing works, but there’s a timing thing here that a lot of folks -- and there’s a lot of employees that are going to be impacted by this in Kern County. So, I would think, as you all are doing your deliberations, the urgency -- and I don’t know how that works. Can you -- I mean, what’s the milestone dates? The dates would be as of January 1, we’re -- we’re all a part of that, unless we petition prior to. So, how do we do that?
COMMISSIONER CENTER: And that’s why we’re having the fact-finding. That’s part of the problem. The legislation does not go into effect till January 1st.

MR. CLARK: It is going into effect January 1st, right?

COMMISSIONER CENTER: That’s when the legislation goes into effect.

MR. CLARK: Yeah.

COMMISSIONER CENTER: And with the question of retroactive enforcement, that’s not been a formal position of this Commission. So, we’re doing the fact-finding hearings. We hope to give you guidance as soon as possible. But the Legislature adopted -- AB 60 was signed by the Governor, and now it’s our cause to implement it.

MR. CLARK: Yeah. I appreciate it. Well, if there’s any -- if there’s any way in which your suggestions or your thoughts as far as us -- you know, on the petition process, we’d certainly be interested, and not necessarily just how do we -- however process you go through that, so that we could get into the loop to do that before my drillers start drilling around my house.

COMMISSIONER CENTER: I understand. I used to work in the dredging industry. It was somewhat similar, so --

MR. CLARK: Yeah. The independent oil, they don’t
call them “independent” for nothing, I’ll tell you.

(Laughter)

COMMISSIONER CENTER: Thank you.

MR. CLARK: Thanks a lot.

COMMISSIONER CENTER: Brad Trom.

MR. TROM: Good morning. I’m Brad Trom. I’m vice president of pharmacy for Albertson’s and Savon Drug Stores in the State of California.

I just wanted to make some comments, and the first being of which I’d like to augment our support for the comments Tim Long made with regard to the California Retailers Association in regards to the pharmacists being considered as an exempt class due to their extreme discretion and independent judgment making that they must have. So, I’d like to -- I’d like to urge you to consider that as one of your thoughts as the new laws take into effect.

Secondly, I want to comment on the family economic impact and the business economic impact and how the new late relates, and the practicality in how it affects pharmacists throughout the State of California.

We currently operate over 400 pharmacies within the State of California. We have a number of collective bargaining agreements with different unions, and we also have nonunion locations.
The impact of an additional time-and-a-half rate after 8 or after 10, based upon their ballot, has an impact that, due to the fact of the limited and the very small reimbursement that prescriptions give back to the employer and to the owner of the business, the probability of paying additional payroll increases above current rates can impact dramatically. Also, in meeting with many of the pharmacists throughout the state in the past couple of weeks and trying to discuss this situation through, that it would change their schedule, and we have a majority of our pharmacists who work on a 12-hour shift. We also are fortunate that we have enough locations where people have an opportunity to choose whether they want to work an 8-hour shift, a 10-hour shift, a 12-hour shift, depending upon the store they want to work at. And the majority of them prefer the 12-hour shifts.

And the points that were brought forth to me by staff pharmacists were of the nature -- and we will have -- at future hearings, we will have some pharmacists that would like to comment themselves -- but in summarizing some of the comments that I received back, that it limits their personal flexibility within their -- within their personal lives, limits part-time jobs that they may have outside of our business. Too, the question that was asked earlier about the economic impact on an individual: if we determine --
and we believe we have determined -- that we can’t afford to
pay time and a half or double time, then we are going to
have to require our folks to work either 8- or 10-hour
shifts. If they work 8-hour shifts, that then, of course,
expands their workweek to a five-day workweek.

It will limit their vacation and their personal
days off because pharmacists -- and within the industry,
it’s very common for pharmacists to cover each other,
somebody taking a day off, somebody else covering it, and,
of course, that would be required that they be paid time and
a half or double time to cover for their partner.

These additional days of work, of course, then
requires that they’re going to work additional days,
additional nights, additional weekends. There will be more
commute days to get to work, which, of course, also affects
things such as childcare, elder care. And from a business
standpoint, we’re concerned about the limitation this may
have on the ability to offer for the consumer expanded hours
that the consumers and the patients can take and get their
prescriptions filled. The vast, vast majority of our stores
have a minimum of a 12-hour shift. They’re open nine to
nine; many are open 24 hours. And with the current law as
it goes into effect, because of the economics of that, that
may force shorter hours in those stores, or if we don’t find
pharmacists that want to work beyond a 10-hour shift, that
also may require us to evaluate the number of 24-hour locations because of the extreme additional payroll that would be required to staff those 24-hour shifts.

The easy answer is to say, “Well, we’ll hire additional pharmacists within the industry.” And the practicality of that isn’t real either, since there is a shortage of pharmacists within the State of California today.

So, those are my comments. And any questions?

COMMISSIONER BROAD: During the debate on SB 651, there was a lot of agitation among pharmacists in favor of the bill because many of them are working 12-hour shifts, 13-hour shifts, and in some cases, 14-hour shifts, without any breaks, no meal periods, no breaks at all. And there was concern that those long, extremely long shifts with no breaks raises a question of prescription errors, which, of course, as you know, are going -- have gone up dramatically. And so, my question to you is whether you think there’s any public health issue here with pharmacists working very long hours with no breaks.

MR. TROM: Well, thanks for bringing that point forward. The State Board of Pharmacy recently passed a law that allows pharmacists to leave the pharmacy to get a lunch break and to have breaks. Previously, it was required by the State Board of Pharmacy or the state regulations that
pharmacists had to be in control or be within the pharmacy at all times. Now, with the new regulations, they will be allowed to leave the pharmacy without having to go through and actually close your business down during that time. And as a consequence, that should eliminate any of the concerns of the long shifts without breaks and without lunches, which we, of course, can identify.

To comment on your second part that has to do with an increased percentage of errors that you’re suggesting, we don’t find that to be true. Recently the prescription incidence of errors has gone down significantly due to the introduction of technology and work procedures and workflow procedures that basically eliminate the possibility of an error because of either the technology checking to make sure it’s the right prescription in the bottle, or, secondly, the ability of having two individuals review all prescriptions. So, we don’t find that to be true at all.

COMMISSIONER DOMBROWSKI: Brad, could you talk a little bit about the technology? Because I think one of the things the industry is looking at is greater use of technology in lieu of some of the manual labor back there.

MR. TROM: Well, one of the biggest increases in technology that allowed pharmacists to be assured that they had the right medication in the bottle was the introduction of scan-verify technology that is a scanned bar code on the
product and a scanned bar code on the label that is
generated by the computer. And the ability to scan those
two bar codes and make sure that they match ensures that
right medication has gotten into the bottle that the bottle
-- that the prescription label generates. So, that’s one of
the technology.

Second, technologies that are coming, which are
very large capital investments which will be coming, will be
the filling of prescriptions by automatic -- automation as
opposed to by individuals.

COMMISSIONER DOMBROWSKI: Thank you.

MR. TROM: Thank you.

COMMISSIONER CENTER: Jim Ewert.

MR. EWERT: Good morning, Mr. Chair, members of
the Commission. My name is Jim Ewert. I represent the
California Newspaper Publishers Association. We have about
500 members that are in our association, both daily and
weekly newspapers throughout the State of California.

The daily overtime standard that is re-established
in AB 60 may work well for those industries that employ
technologies that make widgets, and maybe even some other
industries, but for the newspaper industry, where scheduling
is quite uncertain and there is no cyclic fluctuation in
production, it just doesn’t operate very well at all.

The models that are also in AB 60 for creating
alternative scheduling, the elections, the menu of options, the make-up time provision, also doesn’t work well for the newspaper industry because we can’t estimate when schedules are going to need to change.

We have many employees who are quite unsettled by the upcoming implementation of daily overtime on January 1st, primarily reporters. And the reason why they’re upset about this is the potential that they may be called off particular stories that they’re covering if their employers cannot afford to pay the daily overtime that the law would require.

That is why we have proposed an exemption for the newspaper industry that we think is reasonable and may even work for other industries as well. But essentially, our proposal has generally the following provisions. It would allow an employer and an employee to negotiate day by day or week by week up to 8 hours of overtime that would be eligible for compensation as flex time. Both the employer and the employee would be able to request an individualized flex time schedule under this model. The employee would then have the right to refuse the flex time in favor of being paid an overtime premium as of January 1st for the overtime that’s worked in excess of 8 hours per day.

Again, we think that this would be a reasonable solution for our industry. And if you have any questions,
I’d be willing to --

COMMISSIONER CENTER: Just to comment on that proposal, when you have two employees and the one employee continues to accept the flex time and the other one accepts the overtime, which employee is going to get most of the work, do you think?

MR. EWERT: Well, I don’t know. But certainly, in the ranks of the reporters, they would certainly, at least as indicated to me so far, choose the flex time schedule. And it wouldn’t be a matter of the employer dictating, due to the provisions in this proposal, what type of schedule that the reporter would be working.

COMMISSIONER CENTER: Thank you.

COMMISSIONER BROAD: Jim, how did things function before the previous IWC got rid of the 8-hour day?

MR. EWERT: Well, either the employer paid the overtime to the reporters that stayed on the stories, and most of the large newspapers were able to do that; for community newspapers, they were not. Under the most recent standards that we’ve been using under the federal law, the smaller newspapers have been able to dedicate reporters to cover more local news and more local stories that they probably otherwise wouldn’t have been able to under the old standard, and may not under the new standard.

COMMISSIONER BROAD: Now, I have a technical
question about your proposal. There was a provision passed
dealing with comp time that’s in the Labor Code now that’s
never gone into effect because it conflicts with the Fair
Labor Standards Act in that it requires, in effect, people
to work more than 40 hours in a workweek in some future
week. And how do you deal with that FLSA preemption issue
here in your proposal?

MR. EWERT: Well, we wouldn’t propose that this
carry over into the second week. We would propose that this
occur within the same workweek to comport with the federal
standard. So, there really wouldn’t be a preemption
problem, at least in our view.

COMMISSIONER BROAD: Okay. Now, are you
submitting this as a proposal? Are you petitioning the IWC
to do this, or is it your intent that -- this goes back to
my question of what the IWC can and cannot do -- or do you
feel that we have the authority to just act on this without
convening wage boards?

MR. EWERT: In the event that you determine you do
have the authority under AB 60, it is a formal proposal
submitted for your consideration. If, however, it’s
determined that a formal wage order has to be -- or a formal
wage board has to be convened for consideration of the
proposal, we’ll be more than happy to submit it in a
petition form at that time.
COMMISSIONER BROAD: Thank you.

COMMISSIONER CENTER: Richard Holober.

(No response)

COMMISSIONER CENTER: He must be getting his meal period.

Bruce Young.

MR. YOUNG: You guys look pretty good out there.

Bruce Young, on behalf of the California Retailers Association. And I appreciate the opportunity, Mr. Chairman and members, to speak to you today.

I, frankly, didn’t anticipate coming forward with at least my initial concern about the implementation of AB 60, but I’ve been traveling around the state talking to both employees and employers from the retail community as we go about preparing to implement AB 60. And perhaps, as you all know, we were at least involved deeply in the discussions on AB 60 and 651. One thing I think we probably didn’t calculate, at least from our side, is the fact that our members, our employers, would, in essence, go to five 8-hour days.

And frankly, I think -- and, Barry, you asked the question about the four 10’s -- none of our employers feel the ability even to have an election. I mean, there are so many questions about, you know, what is a work group, do you include part-timers, do you -- I mean, what -- I mean,
there’s a whole process. So, we -- we’ve told our members, and they’re proceeding with the basis on January 1st, you have to have five 8-hour days in place, and there can’t be the flexibility, other than the exemption of the -- that was in there for the July 1st. Even that’s cloudy in some of our members’ eyes.

And we have begun the process of implementing it, telling our employees the new schedules, and the response has been anything but favorable. I think -- they complain about the lack of their own personal flexibility. One of the attractions of retail is, because of the number of hours we have and -- and the store settings we have, we can accommodate people who want to work three days or who want to work a four-day shift, because, again, we’re open a number of hours.

And the problem that -- as I thought, that simply, “Well, then, have the election on January or whenever the Commission acts and change the schedules,” but many of our members are now saying that when they’re -- when the schedules are in place and they’ve hired new people on January 1st, it’s going to be difficult for them to go back. So, if there’s any way, certainly, the Commission or the staff, at least, can give some advisory opinions to the employer community about how to hold elections and what does make up a voting group. And I’ve given to Mr. Baron a
series of questions of all that. Any direction you could
give would be helpful, because we need to do -- certainly,
perhaps a lot of it has to be formally adopted by the
Commission, but at least, again, suggestions or advice or
staff counsel on it would be helpful because many of our
members, as I say, feel they would get to the point of
crossing the Rubicon of giving people new schedules, hiring
new people. And at that point, when then it’s -- the
flexibility is restored, they don’t feel like they have the
ability to arbitrarily go backwards.

And I do want to then speak about two specific
issues in AB 60 that the Commission does have the authority
and the flexibility and, indeed, we would argue, the
direction from the Legislature, to consider. And one of
them is the manager exempt issue. And this is one that has
been -- has bedeviled the retail community for a long time,
because if you fully consider the retail community
environment, where our business is ebbs and flows, where a
manager at -- certainly, at a grocery chain, may at one
point where there’s -- when it’s frantic and busy, either
unexpectedly or it’s a momentary rush, may have to hop on a
register, or help one of his clerks bag groceries, or go out
into the parking lot and pick up carts, that person is still
the manager. Yet, under California -- it’s not even
regulation -- interpretation from previous Labor
Commissioners, there’s been -- it’s been more qualitative than quantitative, where there’s been an interpretation that people cannot use the contemporaneous hand and mind. The California Labor Commissioner, unlike any other state, has ruled that if a person is using their hands, they are not -- then they no longer -- they cease to become a manager. And we would argue that that very narrow interpretation is not realistic, certainly for our industry, but for many others where, again, not as the rule, but just to get -- to service the customer, a manager has many roles.

And it’s not -- and certainly, I think there has to be a bright line drawn so it’s not a matter of not hiring sufficient people, where the manager takes a place of -- for what then would be an under-staffed situation. But as I said, certainly the Commission may -- should -- may consider perhaps making it on an industry-by-industry basis, where, as I say, these ebbs and flows and dealing with the consumers are things that can’t be anticipated many times and can’t be -- and these peaks and valleys can’t be staffed for.

But we really are looking to the Commission for some guidance on this issue prior to July 1st. We will be bringing a proposal at a subsequent meeting with our suggestions and thoughts about how to deal with the status of manager exempt.
And the second one -- issue that I want to deal
with in AB 60 is about the pharmacists. And I think you’ve
heard from just a couple of them, and I guess I’m back not
asking for the blanket exemption, but asking for the
Commission to consider allowing some freedom of choice
between some of these pharmacists. The ones that I’ve met
with over the weekend and during last week have talked about
-- some of them doing the seven on and seven off, and then
there’s also the question of some of them will do four --
work four 10’s one week and five 10’s another week, whether
they can do that. They argue with me that it’s about their
quality of life, their personal -- their personal values.
And some of them indeed also have second jobs. I think
earlier speakers have spoken -- have mentioned the severe
shortage of pharmacists in California. It’s not unusual in
the stores where we have seven on and seven off to find
pharmacists who seven 8-hour days in one week, the next week
when they’re off they’ll work two or three days at a -- at a
hospital or another -- and indeed, another chain store.

And I -- I guess I bring forward that request for
this flexibility on behalf of the pharmacists that I’ve
talked to. And we’re going to ask them to come before the
Commission and try to give you some of their own personal
feelings. But we as the employers -- I mean, as the chains
-- are making the -- are adapting -- I think one of the
ladies from Longs spoke about how we’re actually even taking our assistant managers and making them hourly. Now, that’s not punitive; it’s just trying to adjust to the fact that we’re now going to -- I mean, people are going to be on the clock. In some cases, they are losing their benefits, the flexibility for additional sick time or consideration for vacations. But we are going to adopt and adapt to that.

But on behalf of the employees, we think that some flexibility that could be -- could be adopted that would be -- again, give the employee the ultimate of choice, not be dictated -- I think, as Barry mentioned earlier, some of the stories we heard about 651, about where employees were required to work 13 and 14 hours and come back with no time off -- I think that situation is not tolerable. And we’re again -- a point where a flexible, reasonable schedule could be adopted at the employee’s election with the consent of the employer, we think, would be preferable.

Thank you.

COMMISSIONER CENTER: Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

Joe Brown.

MR. BROWN: Hello. My name is Joe Brown. I’m a plant manager for Conectiv Operating Services Company.

We’re in the electric power business, electric power plants.
My company is based in Wilmington, Delaware, has a few operations here in California, and, very frankly, I’ve been here as the West Coast initiator of our business, and I’ve seen it scale back.

In the past twelve years, our company did invest $50 million in power plants in California. And now, because of unsurety (sic) of -- a lot of it because of unsurety (sic) of legislation in California, we’ve scaled back. We’re just in the service business now, not in the investment business any more.

And I’m afraid that things like AB 60 makes our East Coast-based company, not familiar with what’s happening each day here in the capitol, even more unsure about staying in the service business. We potentially have three more bids next month. AB 60 and the unsurety (sic) of these wage orders has made my company nervous about bidding on those jobs.

But anyway, that’s my editorial. I’ll get to my specific -- thanks for your patience on that -- my specific concerns or request for AB 60 or the wage orders. You know, we’re a 24-hour, seven-day operation. Our operators work 12-hour shifts, as most electric power plants do. And the unsurety (sic) of whether or not on-duty meal periods are still allowed or not allowed in this interim, I don’t know. I’ve got different interpretations.
The unsurety (sic) of the double-time pay after 8 hours on the seventh day, because of the wording, currently it’s worded -- well, AB 60 says double time after 8 hours on the “seventh day.” The previous or currently existing wage order says “seventh work day.”

We, in all our plants, have four operators that are regularly scheduled on Sunday, which is our seventh day of the pay week. They’re working 12-hour shifts, so that would put what currently is time and a half after 8 hours as 4 hours of double time.

And this is an unsurety (sic). I really don’t know what the law says to do January 1st.

And the main thing, even though, you know, I don’t think AB 60 was necessary, I think it was rash -- but that’s editorialism, I guess, again -- what I need to know is what are the rules that I’m working by? Right now, I’m held up on finishing my budget for next year. I’m late. And it’s affecting whether or not we get benefit enhancements improved in other areas, like disability insurance and health plans, not knowing whether we’re paying double time after 8 or time and a half after 8. It’s holding me up on my budget process, getting those benefits approved, which the rest of our company is doing in 51 other states. Ours is on hold, on approval, because of this unsurety (sic), what our expenses are going to be.
The biggest impact is the unsurety (sic) of the paid on-duty meal period. There’s not a single guy in any one of our plants that’s working 12-hour shifts that isn’t 100 percent for this on-duty paid meal period. I’m not sure that we can continue this without a liability between January and July, that there’s not some daily penalty that -- I don’t know which wage order we’re following here, what’s the interim rules.

I’m also currently holding up posting our shift schedule for the year 2000. I normally would have done that the first of this month. This is November now. Operators want to plan their lives after January 1. I don’t know for sure whether we can have 12-hour shifts, I’m so unsure about interpretations here.

So, what I’m asking is that we can get clarity, that we know what the rules are that we’re living by, not July 1 next year. The law is effective January 1, and we’re going to post the detailed rules July 1 -- that’s -- that’s totally unacceptable. I need to know today, not -- let alone January 1, because it’s affecting my operation today.

And I don’t -- you know -- you know, I would suggest something as simple as -- I think the intent of the law was that the previous wage order goes back into effect, although there were some changes. So, I have here, like for our case, Wage Order 4-89 for the professional and
technical; that was the one in effect before the -- before. I went through here, and I’m kind of -- you know, I’m not the right guy to do this, but I could go through here and compare what I’ve read off the Internet on AB 60, and I can make four changes to this, with a red line, and then say: “Post this; this is the rules we live by till July 1,” or something of that nature.

I need to know the rules, and I need to know them like this afternoon, not January 1, and certainly not July 1. That’s -- that’s my big problem.

I don’t like AB 60, but it’s here, we’ve got to live with it. So, what are the rules to live with it, to live by?

COMMISSIONER BROAD: I am sure that -- I mean, speaking for myself, I’d like to be able to tell you definitively this afternoon what you have to do.

MR. BROWN: Yeah.

COMMISSIONER BROAD: The problem is, we have one of these --

MR. BROWN: Yeah.

COMMISSIONER BROAD: -- it’s been alluded to -- we have one of these kind of structural problems of what happens when bills are passed. They don’t go into effect on January 1, so anything that the Commission does officially prior to January 1 to implement the bill would be
potentially subject to some legal challenge, that the Commission was without authority to provide definitive anything prior to January 1. So, it’s one of those situations where you have to use, I think, the best, reasonable judgment.

Now, you know, there’s a couple things here. You’re probably right: what it’s going to look like after January 1 is the restoration of Order 4-89 and the others, with, you know, a relatively small number of changes, good through July, at which point some permanent changes will be made in all the wage orders, based on AB 60.

Some of the issues that you alluded to, in my opinion, were simply codifications of existing law. And I think the “seventh day” issue was probably an ambiguity created in the way the statute was drafted, but I don’t think that the proponents -- they’re not here, but I don’t think the proponents intended to change the rules with regard to the seventh day of work. I don’t think it would make much sense if they did. I don’t think it makes much sense to suggest that if someone works one hour a day and that, on the seventh day -- or, you know, three hours in a week and then on the seventh day of the week, even though they’ve worked three hours that week, they’re suddenly going to get a whole bunch of overtime, that’s really -- it’s about the seventh consecutive day of work.
MR. BROWN: Yeah.

COMMISSIONER BROAD: So, I --

MR. BROWN: But that word is missing.

COMMISSIONER BROAD: I understand that. I understand that, but I --

MR. BROWN: Yeah, the “seventh day of work” is missing. The word “worked” is missing, yeah.

COMMISSIONER BROAD: Right. I realize that, and I wish it wasn’t missing. It is missing, but -- and I think that, you know, if we could provide guidance today, I would certainly vote to say that what that was intending to do was -- was restore -- was actually codify the existing rule.

That rule has never really been changed. I mean, you know, in the -- so, I -- I think you have to try to use some common sense in this, and perhaps talk to the Division of Labor Standards Enforcement and discuss with them what their opinion of what happens on January 1.

And I think it’s incumbent upon us, just as soon after January 1 as we can do it, to give people a definitive answer to these questions. But, you know, it may be January 10th before we could do that, because we would have to hold public hearings based on what the statute says, hear many of these concerns again, have something out, probably prior to that, for people to at least be looking at, so that they have the ability to comment and suggest changes that they
might like before we were to adopt something.

But your point is well taken. Businesses have to operate as of January 1, and they don’t want to operate in a vacuum without guidance. But I think we all have to sort of move forward with as logical an approach to this as possible.

MR. BROWN: Yeah. I appreciate -- I appreciate your guidance, as much as you can give at this point. But you need to respect that there are penalties in this, that include civil penalties, and there’s a daily penalty which could be considered a bounty type thing, the daily penalties that are in this new AB 60, $50 a day per incident. And I’m going to be doing payroll January 1 because I don’t pay my payroll person enough to take the liability for $50 -- and she gets paid very well, but she’s nervous about doing payroll January 1.

But I do respect your position, that you can’t maybe legally take action or guidance today for fear of -- and a legitimate fear of somebody filing suit, but you’re putting me and all the other employers in that position January 1 by not taking that action. That’s the problem here, is the penalties that are written into this. And they could be -- they could be bounty type penalties.

COMMISSIONER DOMBROWSKI: I don’t know if you have done anything about contacting either the Department of
Labor with some specific written questions on these matters, because, obviously, everybody this morning has the same problem you have there. There's mass confusion about how this thing's going to be implemented. But I would think it would be appropriate to at least try to get some questions on paper to them, see if they can give some guidance, at least.

MR. BROWN: Okay. Thank you.

COMMISSIONER CENTER: And as earlier noted, their chief counsel is here today listening to the testimony, so --

MR. BROWN: Oh, good.

COMMISSIONER CENTER: -- hopefully, he takes that into consideration. So --

MR. BROWN: Where's he at?

COMMISSIONER CENTER: I don't want to identify him. You'll lynch him right now. So --

(Laughter)

COMMISSIONER CENTER: You need to bend their ear a little bit.

COMMISSIONER DOMBROWSKI: He's the guy in the red tie.

MR. BROWN: Okay.

COMMISSIONER CENTER: Thank you.

MR. BROWN: Well, thank you very much for
listening.

COMMISSIONER BROAD: Mr. Chairman, maybe it would be appropriate to ask the chief counsel to come up and ask if they’ve taken any -- given opinions on this and what their opinions might be on some of these things that have come up repeatedly. Is that -- after lunch? I mean, after the people have testified.

COMMISSIONER CENTER: Yeah. Is there anybody else in the audience who has not testified who would like to at this time?

(No response)

COMMISSIONER BROAD: No. We’re done.

COMMISSIONER CENTER: I don’t know. Miles, are you prepared to address the Commission?

MR. LOCKER: (Not using microphone) Certainly. Would you prefer I do it now, after lunch, or what?

COMMISSIONER CENTER: Well, we’re not going to have lunch, but -- yeah, I listened to you -- so, don’t take too long, Miles.

MR. LOCKER: Hi. I’m Miles Locker, chief counsel for the State Labor Commissioner. And thank you for inviting me to speak.

A couple of the questions that -- first of all, I just want to say that we have been amassing quite the collection of requests for opinion letters on AB 60, on how
we interpret it and how we would intend to enforce it. And it’s our hope to start getting these out very quickly, within the next two weeks. And it’s also our hope that as they come out, we would like to see them posted on the Department of Industrial Relations Web site. I think that would be very helpful to the entire public. So, that’s what we’re aiming for.

And in assessing a lot of the questions we’ve gotten, both in terms of written letters to us and also what I’m listening to today, we do -- you know, preliminarily, I think we do have answers to a lot of the questions that seem to be troubling people.

First of all, in terms of just a few things, I guess, the confusion about the “seventh day” of work, the same way as Commissioner Broad was speaking before, we do agree that that needs to be read in the context of the entire section there. And we would interpret that to -- it’s an ambiguity. We would interpret the provision for double time after 8 hours on the seventh day of work to mean after the seventh consecutive day of work in the workweek, that it needs to be read in conjunction with the earlier part about -- the section that talks about time and a half for the first 8 hours in the seventh consecutive workday of the workweek. So, that would be the answer to that.

There -- I think, you know, one issue that we’ve
heard a lot about, and I guess I was listening to today come about, in terms of the issue of meal periods and whether or not AB 60 does away with the on-duty meal period. And we do not believe it does away with the on-duty meal period. And there are a couple reasons that we would say that. First of all, with respect to, I guess -- let me just find this here -- Section 516 is added to the Labor Code to provide that:

"Notwithstanding any other provision of law, the IWC may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers."

When you start something with "notwithstanding any other provision of law," that seems that there's clearly an intent to give the IWC the authority to regulate as to, you know, the on-duty meal period.

Also, going back to Section 512 that's added to the Labor Code under AB 60, I think what's significant in reading this is it talks about the requirement for the first meal period of the day, that if -- it's required if you're working more than 5 hours in a day, but it can be waived by mutual consent if you are working up to 6 hours, over 6 hours, then, it says you have to get that meal period. It then goes on to say, though, that:
“An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee” --
-- and here’s the key --

“ -- only if the first meal period not waived.”

What that tells me, then, is that despite what it says earlier in the section, that you can’t do a waiver if it’s more than 6 hours, the next sentence after that is saying, yes, there can be a waiver; what you can’t waive is the second one, then, if you’re working, you know, more than 12 hours. It provides that you can waive the first.

So, we’re kind of thinking, “What does this mean, if it first says you can’t waive the first and then implies that you can waive it?” And our thinking on that is there’s only one way you can still waive that first meal period, and that would be, then, through an on-duty meal period. So, we do not think there was an intent to do away with that. And I know this sounds a little convoluted, but, you know, in searching through this language and trying to figure out
what it all meant, I think that’s the most reasonable reading of it.

I know there’s a lot of other questions out there in terms of, for example, provisions in the existing IWC orders that provide for express exemptions such as -- we were talking about truck drivers before. I think, clearly, AB 60 provides that as to any of the pre-1998 wage orders, if you have -- if there is an exemption contained within one of those orders, such as the truck driver situation, then that exemption would still apply. So, that would be our answer to that.

And, I guess, in terms of just some enforcement issues that I just want to touch on, because what I was hearing was an awful lot of discussion about -- well, suggestions to the IWC to somehow expand the administrative exemption somehow to cover certain groups of people now, I think it is important to note that with respect to how DLSE enforces the administrative exemption, in terms of -- and certainly, we enforce it -- to the extent that California law is inconsistent with federal law, to the extent it provides for greater protections to workers than federal law, we are very careful to apply, you know, the California greater protections, as the recent Supreme Court case, Ramirez v. Yosemite Water Company, that talks about that.

But, on the other hand, where the purposes of the
law and the law is -- where there is a consistency, then we do rely on federal law and federal regulations. And in one area on that is with respect to the definitional question of the administrative exemption. Certainly California law differs from federal law in that you have the “primarily engaged in” test versus the “primary duty” test. But with respect to defining certain things about the administrative exemption, the question of discretion, independent judgment, what’s found in intellectual work, those phrases that are found in the existing IWC orders, we do look to the Federal Code of Regulations and federal case law. And one of the things that we get out of that is the dichotomy between production workers versus workers who would truly be administratively exempt.

And I think that, certainly, in terms of our own enforcement, with respect to workers who are employed by an employer, where what that employer is doing is producing a product or a service for customers of that business, if that’s what that enterprise is doing, then the workers who are engaged in doing that cannot come under the administrative exemption. There’s a whole bunch of federal cases in the last ten years under the FLSA that have spoken about that. And instead, the administrative exemption is geared towards workers who are employed dealing with administrative issues for the enterprise itself. And I
think that’s an important distinction, because otherwise, I think you’d be running into some issues there.

COMMISSIONER BROAD: So, in other words, if people were coming forward and saying, “Let’s just take the administrative exemption and instead of having the test that’s in the wage orders now, primarily engaged in activities which are intellectual, et cetera, et cetera, we’re going to have a list -- a laundry list of things -- if it’s a pharmacist, if they actually -- if they, you know, look at the bottle and see if it’s got the right prescription in it” -- that, in effect we would be running up against a federal Fair Labor Standards Act preemption question --

MR. LOCKER: Absolutely.

COMMISSIONER BROAD: -- squarely.

MR. LOCKER: Yes, squarely. There’s simply no way that -- if you have a pharmacist, for example, employed by a pharmacy or a hospital, let’s say, there’s no way under federal law that person is going to fall within the administrative exemption. It’s just -- it’s consistent with -- within the production versus true administrative dichotomy, they would fall as a production worker.

So, I did want to mention that.

In terms -- earlier there was a little bit of discussion, I guess, with respect to the issue of, I guess,
in the computer industry and hourly employees. The speaker was correct that under federal law, which has a salary basis test under the FLSA, and also, certainly, under AB 60 now, that it will have a salary basis test, if you are an hourly employee, you -- that you’re not going to be exempt. And that’s -- you’re simply -- that can be the end of the discussion. The only way, under federal law, these computer professionals could now be exempt is because, in 1990, the FLSA was amended by Congress to specifically provide for that type of exemption for computer professionals, and it provided that they could be paid on an hourly basis and provided that they were making six and a half times the minimum wage and were engaged in certain types of activities that are delineated in the Code of Federal Regulations.

Under California law, it’s a different situation. First of all, as I indicated, you do have a salary basis test in now. But secondly, there’s nothing in California law in any of the existing IWC orders that would apply that provide for a special exemption with respect to workers in the computer industry. Instead, what we look at is really the learned professional exemption that’s been, you know, set out in the IWC Orders 1, 4, 5, 7, and 9, I believe, in the 1989 versions of those.

And quite frankly, there, there’s a little bit of a dichotomy there too between state and federal law.
Federal law dealing with computer workers specifically provides that they are -- that they would be exempt under the special new federal provision, notwithstanding whether or not they would have been exempt under the learned professions exemption. In California, the 1989 IWC order “Statement of Basis,” talking about how DLSE ought to be enforcing the learned professions exemption, it basically DLSE and suggests that DLSE ought to be relying on federal regulations in delineating the learned professional exemption. And in looking at that, one of the things that the Code of Federal Regulations talks about in that exemption is that it is almost universally expected that for someone to be exempt as a learned professional, they would not only have a basic academic degree, but some sort of advanced degree or certificate beyond that. So, in general, what we’re looking it not just a B.A., but also some -- perhaps a year or something beyond that, a master’s degree or some certification beyond that. Again, this is different than federal -- than the federal provisions on the computer industry, because there you could have someone who perhaps, you know, doesn’t have a bachelor’s degree at all, but because they’re doing this type of work and making more than six and a half times the minimum wage, they’d be exempt. But that did take a specific law.

If you have any other questions or anything, I’d
be happy to respond.

COMMISSIONER BROAD: One question that’s come up is the collective bargaining exemption. My understanding is that that proponents of AB 60 intended to codify the existing collective bargaining exemption that was in -- that was in the wage orders. Is that how you view that? Or do you view it as accomplishing something different?

MR. LOCKER: Codification and going a tiny bit beyond it, I would say, is how DLSE view it.

COMMISSIONER BROAD: Okay.

MR. LOCKER: Under the existing wage orders -- well, certainly, the most -- the one difference that’s visible right away is, instead of a dollar an hour more than the regular rate now, it’s thirty percent more or whatever. But that’s clear.

The other difference that I think is very important is, in the existing wage orders, it talks about premium pay for “overtime hours worked.” The language that the statute now uses, AB 60 uses, is premium pay for “all overtime hours worked.” And adding the word “all,” I think, was significant. We had been involved -- DLSE had been involved in a couple of court cases on that very subject, where you had collective bargaining agreements that provided, let’s say, for no premium pay until the tenth hour or the twelfth hour of employment in a day, and then did
provide for premium pay. And it’s our understanding the intent of “all” and how we interpret “all” is to mean there has to be some premium pay for all overtime hours worked, and overtime hours would be defined by the statute as anything over 8 in a day or 40 in a week.

    Now, having said that, premium pay, that’s the area where -- premium pay does not necessarily mean time and a half. It could be ten cents an hour more than the regular rate of pay. But we do think there has to be premium pay for all overtime hours worked.

    COMMISSIONER CENTER: Any other questions?

    COMMISSIONER COLEMAN: Chuck, I had a sort of a procedural question.

    In terms of giving some guidelines to the employers, as we go through these hearings, can we -- are we talking about maybe drafting some guidelines that people can comment to us so that we can then implement them as soon after January 1 as we can gather ourselves, to give us much assurance as possible as soon as possible?

    COMMISSIONER CENTER: Yeah. I think our goal right now is by the December meeting, to have some draft guidelines, to have the industry comment -- labor and industry, and then be ready to act as soon as possible in January.

    COMMISSIONER COLEMAN: Okay.
COMMISSIONER CENTER: I think that’s our goal and that’s where we’re trying to go right now.

MR. BROWN: (Not using microphone) A question from the audience.

Can I -- can I ask a question?

Yes. I just wanted to ask about the on-duty meal period.

THE REPORTER: Identify yourself, please, and come to the microphone.

MR. BROWN: Joe Brown, from Conectiv Operating Services Company.

COMMISSIONER CENTER: You should address that out of the room. We’re an independent commission, and we’ll offer guidelines to DLSE. But if it’s a DLSE question, you might just want to address him individually outside.

MR. BROWN: Oh, okay.

COMMISSIONER CENTER: That’s a suggestion.

MR. BROWN: Okay.

COMMISSIONER CENTER: No other comments from the audience?

(No response)

COMMISSIONER CENTER: And Miles will be here to answer questions. He likes to answer questions.

MR. LOCKER: Absolutely.

COMMISSIONER CENTER: With that, I’ll entertain a
motion to adjourn.

COMMISSIONER BROAD: So moved.

COMMISSIONER CENTER: And a second?

COMMISSIONER DOMBROWSKI: Second.

COMMISSIONER CENTER: All in favor.

(Chorus of "ayes")

COMMISSIONER CENTER: Motion carries.

(Thereupon, at 12:29 p.m., the public meeting was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

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I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California, that I transcribed the three tapes recorded at the Public Meeting of the Industrial Welfare Commission, held on November 8, 1999, in Sacramento, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my abilities.

Dated: November 22, 1999 ______________________________

CYNTHIA M. JUDY

Reporter/Transcriber