STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
INDUSTRIAL WELFARE COMMISSION

Public Meeting

November 15, 1999
Hiram Johnson State Office Building
455 Golden Gate Avenue, Auditorium B100
San Francisco, California
PARTICIPANTS

--o0o--

Industrial Welfare Commission

CHUCK CENTER, Chair

BARRY BROAD

LESLEE COLEMAN

BILL DOMBROWSKI

Staff

ANDREW R. BARON, Executive Officer

MARGUERITE C. STRICKLIN, Legal Counsel

MICHAEL MORENO, Principal Analyst

LISA CHIN, Administrative Assistant

Others Present

MILES LOCKER, Chief Counsel, Labor Commissioner, Division of Labor Standards Enforcement
<table>
<thead>
<tr>
<th>Index</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proceedings</td>
<td>5</td>
</tr>
<tr>
<td>Public Testimony:</td>
<td></td>
</tr>
<tr>
<td>KEN SULZER, Association of Energy Service Companies, Independent Oil Producers Agency, California Independent Petroleum Association</td>
<td>8</td>
</tr>
<tr>
<td>FRED HOLMES, Western Drilling</td>
<td>8</td>
</tr>
<tr>
<td>PAUL HANCOCK, Poole California Energy Services</td>
<td>8</td>
</tr>
<tr>
<td>TIM LONG, California Retailers Association</td>
<td>27</td>
</tr>
<tr>
<td>DAVE FONG, Longs Drug Stores</td>
<td>32</td>
</tr>
<tr>
<td>DUANE BLACK, pharmacist, Longs Drug Stores</td>
<td>46</td>
</tr>
<tr>
<td>ALAN POPE, Longs Drug Stores</td>
<td>53</td>
</tr>
<tr>
<td>BILL WEBSTER, pharmacist, Vons Pharmacy</td>
<td>66</td>
</tr>
<tr>
<td>VINCENT PAYNE, pharmacist, Pavilions/Safeway/Vons</td>
<td>68</td>
</tr>
<tr>
<td>JOHN PEREZ, United Food and Commercial Workers</td>
<td>72</td>
</tr>
<tr>
<td>BOB ROBERTS, California Ski Industry Associations</td>
<td>76</td>
</tr>
<tr>
<td>MARLA HERRERA, respiratory therapist, John Muir Medical Center</td>
<td>77</td>
</tr>
<tr>
<td>SAL NICOLOSI, chemical worker, Dow Chemical</td>
<td>86</td>
</tr>
<tr>
<td>STEVE FRIDAY, Dow Chemical</td>
<td>89</td>
</tr>
<tr>
<td>VICKI ZAHN, nurse, Queen of the Valley Hospital</td>
<td>92</td>
</tr>
<tr>
<td>CONNIE DELGADO ALVAREZ, California Healthcare Association</td>
<td>97</td>
</tr>
<tr>
<td>JUDITH LEVIN, Family Support Services of the Bay Area</td>
<td>99</td>
</tr>
<tr>
<td>JULIANNE BROYLES, California Chamber of Commerce</td>
<td>105</td>
</tr>
<tr>
<td>JOHN DUNLAP, California Restaurant Association</td>
<td>106</td>
</tr>
<tr>
<td>Name</td>
<td>Company/Title</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------------------------------------------------</td>
</tr>
<tr>
<td>GREG WELLINGTON</td>
<td>Papa Murphy's Pizza</td>
</tr>
<tr>
<td>JIM NICHOL</td>
<td>Harmon Management</td>
</tr>
<tr>
<td>Afternoon Session</td>
<td></td>
</tr>
<tr>
<td>MARCY SAUNDERS</td>
<td>State Labor Commissioner</td>
</tr>
<tr>
<td>MAUREEN WRIGHT</td>
<td>Respite Inn</td>
</tr>
<tr>
<td>LISA TOMLINSON</td>
<td>Pac Pizza</td>
</tr>
<tr>
<td>MARCIE BERMAN</td>
<td>California Employment Lawyers Association</td>
</tr>
<tr>
<td>GAIL SKINNER</td>
<td>nurse, California Pacific Medical Center</td>
</tr>
<tr>
<td>MARY CHRIS VALLARIO</td>
<td>nurse, California Pacific Medical Center</td>
</tr>
<tr>
<td>JONATHAN MAYES</td>
<td>Safeway</td>
</tr>
<tr>
<td>RON BINGAMAN</td>
<td>pharmacist, Safeway</td>
</tr>
<tr>
<td>MARC KOONIN</td>
<td>Steinhart &amp; Falconer, LLP</td>
</tr>
<tr>
<td>BRAD CINTO</td>
<td>pharmacist, Walgreens</td>
</tr>
<tr>
<td>FRANCIS CHENG</td>
<td>pharmacist, Longs Drug Stores</td>
</tr>
<tr>
<td>JIM MERRILL</td>
<td>United Defense</td>
</tr>
<tr>
<td>SUSAN KRAFT</td>
<td>Safe, Inc.</td>
</tr>
<tr>
<td>TOM RANKIN</td>
<td>California Labor Federation, AFL-CIO</td>
</tr>
<tr>
<td>FRED MILLS</td>
<td></td>
</tr>
<tr>
<td>JIM EWERT</td>
<td>California Newspaper Publishers Association</td>
</tr>
<tr>
<td>Adjournment</td>
<td></td>
</tr>
<tr>
<td>Certification of Reporter/Transcriber</td>
<td></td>
</tr>
</tbody>
</table>
COMMISSIONER CENTER: Good morning, everybody. Can you hear me in the audience?

I want to welcome you to our second fact-finding hearing on implementation of Assembly Bill 60 on daily overtime requirements.

I’d like to call the roll of commissioners and establish a quorum.

AUDIENCE MEMBER: (Not using microphone) Turn it up! Can’t hear.

COMMISSIONER CENTER: I can’t turn it up from here. It’s got to be back there.

Can you get an audio-visual man back there?

Let me call the roll anyway.

First, Leslee Coleman.

COMMISSIONER COLEMAN: Here.

COMMISSIONER CENTER: Bill Dombrowski.

COMMISSIONER DOMBROWSKI: Here.

COMMISSIONER CENTER: John McCarthy.

COMMISSIONER McCARTHY: Here.

COMMISSIONER CENTER: Barry Broad.

COMMISSIONER BROAD: Here.

COMMISSIONER CENTER: Chuck Center. Official
quorum.

And the meeting’s now open. And we’ll wait for the mike before we start.

I’ll tell you -- you can hear me because I talk loud -- anybody that wants to speak, please come up and sign up at the sign-up sheet in the very front, if you would like to speak at the hearing. Thank you.

(Pause)

COMMISSIONER CENTER: Is this mike any better or is it the same?

AUDIENCE MEMBER: (Not using microphone) It’s better.

COMMISSIONER CENTER: Okay. I thank you.

What we’re attempting to do is have input from industry that’s going to be affected by the new legislation that comes into effect January 1st. And with that, we’re taking all the testimony -- it’s being recorded. We’re reviewing all the letters. We hope to have draft regulations for you to review at our December 15th meeting, and, as soon as we possibly can in January, act on those regulations.

I’d like to also just, for information of the commissioners, I would like to entertain a motion to direct our Executive Director, Mr. Andy Baron, here -- I’ll introduce him here -- to send a letter to the Department of
Industrial Relations, the Division of Labor Standards Enforcement, pursuant to Section 1198.4 of the Labor Code to inform the Commission of any changes in enforcement policy implementing any regulations that fall in the purview of the Industrial Welfare Commission.

With that, I would make a motion to adopt that.

Do I have a second?

COMMISSIONER BROAD: Second.

COMMISSIONER CENTER: Call the roll. All in favor, say "aye."

(Chorus of "ayes")

COMMISSIONER CENTER: Any opposed?

(No response)

COMMISSIONER CENTER: The motion is passed. Thank you.

With that, I’d like to, as soon as the individuals get done signing up, call our first speaker up here. And just for information, we’ll have -- we have the sponsors of the bill that will be here to address everybody at the end of the testimony, and also the State Labor Commissioner will be here to also address the Commission too. Thank you.

(Pause)

COMMISSIONER CENTER: With that, I’d like to call the first speakers, and I assume they’re a group of three.
It’s Ken Sulier (sic), Paul Hancock, and Fred Holmes.

MR. SULZER: Good morning, Chairman Center and members of the Commission. My name is Ken Sulzer. I’m a partner at Seyforth, Shaw, Fairweather, and Geraldson, in Los Angeles. I represent the Association of Energy Service Companies, the Independent Oil Producers Agency, and the California Independent Petroleum Association. With me, on my right, is Mr. Holmes, Fred Holmes.

Want to introduce yourself?

MR. HOLMES: I’d Fred Holmes, with Western Drilling, and I’m also the president of AESC and IOPA, and along with the CIPA, C-I --

MR. SULZER: CIPA is the California Independent Petroleum Association.

MR. HOLMES: Yes.

MR. HANCOCK: And my name is Paul Hancock. I’m a senior vice president for Poole California Energy Services, and I’m the vice chairman of the Association of Energy Service Companies and also a member of the California Independent Petroleum Association.

MR. SULZER: The employees of our members work for oil service companies, offshore and on-site drilling companies.

I want to give you a little information about the employees in our industries so that you have some background
for the legal arguments that I’ll set forth.

Offshore oil drilling employees typically earn about $50,000 per year; service company employees between $30,000 and $50,000 per year. Many of the employees typically work 12-hour shifts and receive -- do not receive overtime based on the exemptions or exclusions of the on-site oil drilling that are set forth in numerous IWC and DLSE documents, as the law currently stands.

Most of these people who work the 12-hour shifts work a schedule of seven days on and seven days off. So, many of these employees basically have 26 weeks a year off of work, and do various different things with it, have second jobs, go to school, et cetera, somewhat analogous to firefighters, who work large hours, many longer -- longer workweeks, and then are off for significant periods of time. This is particularly true in the offshore situation, although it is also true in many respects for onshore oil employees.

By our count, there’s approximately 3,000 to 4,000 employees who would be subject to the exclusion or the exemption of the on-site oil drilling employees in our state. There are approximately 45,000 operating wells in California.

Our purpose today, in addition to providing some information about our industry and our employees to the
Commission, is to address two specific legal issues. And real simply, what it is, is what’s the current state of the law, before January 1 of 2000, and second, as of January 1, 2000, what is the state of the law with respect to these exemptions and exclusions, in particular, on-site oil drilling, which is what we’re here to talk about. But those exclusions are basically the same for on-site construction, logging, and mining, and those legal arguments would apply to those industries as well.

First, the overriding premise of our position, both before January 1 of 2000 and after January 1, 2000, is that unless and until the IWC acts to promulgate a wage order regarding these people, that these people would be excluded from enforcement by DLSE of regulations by IWC, as they are currently.

With respect to the state of the law, I’m going to give you a brief historical background as to why these industries have taken these positions and why it was reasonable to do so. It goes back to February, 1974, a statement by IWC Commissioner Chairman Todd, that basically said, “We have no intent, we never want to regulate on-site oil drilling, logging, mining, and on-site construction.”

Since that time period, there have been at least -- at least ten by my count, and I’m sure there are more as we continue to research archives and so forth -- different
statements by the IWC, 1974m multiple statements in 1978, and later on, that illustrate that this is the intent of the IWC, and this is the state of law. There’s even a statement by the deputy Attorney General in 1974 which says, “The current state of the law is these people are excluded from regulation by IWC.”

The reason we’re up here today is that the Division of Labor Standards Enforcement has taken the position, at least publicly in legal briefs in a case before the -- in Orange County that’s before the Court of Appeal right now, called Hestand v. Jose Miyan, which says, basically, that it doesn’t matter, all these statements by the IWC and so forth doesn’t matter; we’re going to go retroactively and go back to essentially 1996 and say there’s no exclusion and you have to pay overtime for all these people for all this time.

And needless to say, our industry thinks that that is incorrect, an incorrect position to take, and it’s being litigated right now. And my understanding as of today is that that case has been stayed and will have oral argument sometime in May. Oral argument was originally scheduled for November 16th. I don’t know that for sure.

MR. LOCKER: (Not using microphone) Oral argument was vacated.

MR. SULZER: Okay. Thank you.
We’ll provide all these statements and all the back-up evidence of the various statements by the IWC and the DLSE on this with our written comments that we’ll make that will set forth these legal arguments.

One of the principal legal reasons why, as of January 1 -- and both as of January 1 and as we sit here today, these people aren’t covered by any wage order -- there was never a wage board convened to address these industries or individuals working in these industries. No wage boards were ever convened. It’s patently clear from several statements by the IWC on the record that the wage boards that were convened for the other wage orders, including Wage Order 4, the occupational catch-all wage order, did not include consideration of the employees who are the subject of these exclusions.

Accordingly, under Labor Code 1178-1181, there’s no valid wage order that covers these people until the IWC acts and covers them with a wage order. And I believe, although the archives on Wage Order 4 would probably bear that out, I have not -- that’s an area that we’ll submit more written materials on to the Commission.

Again, to address the retroactivity issue, there was a statement made, apparently, that there’s no explicit exemption for these people. What it is, in the “Statement of Basis” for the minimum wage order -- I believe it’s MW-
80, there is -- was a statement in the “Statement of Basis” that says these people are not covered by any IWC orders. They are covered by the minimum wage orders, but they’re not covered by anything else.

As similar evidence of that and looking to another branch of government that kind of covers this exclusion, in 1987, Assembly Bill 809 was passed, 42 to 36, which basically said these on-site employees are -- should be covered by Wage Order 4 until the IWC acts to create a wage order for these employees. The bill was passed by the Assembly, vetoed by the governor, so it was recognized by the Legislature, and apparently the governor, that these people were not currently covered by any IWC wage order; they were excluded or exempted. And the legislative history on this issue suggests that everyone understood that quite clearly and expressly.

An additional point, in a case called Cooper Heat, which was an on-site construction case, there was a stipulation on the record in that -- in that case with respect to on-site construction, but it set forth the point, the DLSE’s position, stipulated on the record in court, that these people were not covered by any IWC order, they were exempted, excluded, et cetera.

And I use the terms “exemption” and “exclusion” somewhat interchangeably, and I’ll get to that later. There
are numerous DLSE interpretive bulletins that refer to the exclusion of these industries as an “exemption,” and they are treated like the exemption for public employees, transportation employees, et cetera, that are set forth in the wage orders themselves. DLSE has treated them that way in their interpretive bulletins.

In short, this issue, particular with respect to retroactivity, has been considered many times, many different places, and it’s always come out that these people are exempted or excluded from the IWC wage orders. And our hope is, at least with respect to the retroactivity issue, is that the IWC consider these arguments as it does its work in the future.

And all these -- I went through this because I think all these kind of facts and this evidence is relevant to issue number two, which we’re all really here to talk about, which is what happens January 1, as of January 1. It’s our position that because the wage orders were specifically reinstated in AB 60 by Section 21, that the exemptions or exclusions are also continued and reinstated in the bill.

DLSE’s position may or may not be that the 8-hour day governs immediately as of January 1, despite the reinstatement of wage orders with the various exemptions, exclusions, and otherwise. We don’t believe that this
position is correct, and I’ll go through some of the reasons
that we believe that.

First, Section 21 reinstates the wage orders, and it reinstates the wage orders as they are. Wage Order 4, for example, it reinstates. We’re excluded from Wage Order 4. There was never a wage board convened for on-site oil drilling, so what Wage Order 4 covers is not us. We’re excluded and exempted, and we would be entitled to that exclusion or exemption based on the reinstatement of the wage orders.

To counter the argument, “Well, AB 60 says everybody’s got an 8-hour day and you can’t have an alternative workweek of more than 10 hours in the day,” there’s a statutory construction issue. The wage orders, arguably, conflict with the statute. What’s more specific? Well, the wage orders are specifically reinstated, 1, 2, 3 -- with all of their exemptions, et cetera. That should take precedence over the general terms of the statute. I’ll sort of explain why we feel that way.

Number one, the wage orders don’t conflict with the statute because the statute itself enables the IWC to create exemptions. It grants broad authority to create exemptions. So, there is some expectation in AB 60 that there will be other people that may be exempt from those specific terms of AB 60. So, that’s no surprise, on the
face of the legislation.

Second, AB 60 doesn’t say the wage orders are reinstated to the extent consistent with the statute. The statute could have said that. It could have also said AB 60 reinstates the wage orders except for the 8-hour day and except for the maximum 10-hour alternative workweek. It doesn’t say that. Another point on this ground, Section 11 says the IWC must promulgate wage orders which are consistent with AB 60. If you read Section 21 that reinstates the wage orders, it doesn’t say anything about consistent with AB 60. It says they’re reinstated. If they wanted to say that, they could have, just like they said in Section 11. And as a rule of statutory construction, that should be significant.

And I think that’s consistent with businesses’ understanding -- these industries’ understanding of what was happening when AB 60 was going through, that it was intended to undo what was removed during the Wilson administration, meaning the 8-hour day overtime, during 1997 and 1998.

Again, another argument that I think shows that this is sort of the correct interpretation until there’s some action by the IWC is that saying that this exemption disappears as of January 1 leads to some absurd results. For example, neither in the Labor Code nor in AB 60 are public-sector employees exempted from the statute. They’re
exempted by IWC actions. If the wage orders are reinstated
without their various exceptions, exemptions, and others
lost, I would argue that public-sector employees would be
covered by the 8-hour day, that trucking employees may be
exempted -- could be, and so forth. The only way you get
away from that is if you were to say, “Well, this is an
exclusion and not an exemption,” and I don’t think that
argument holds water because of what I’ve said earlier.

Fifth, I think the industry and most people
dealing with this didn’t understand that AB 60 was intended
to change this at all. For example, these associations did
not submit letters in opposition to AB 60. It was
understood that this was undoing the 8-hour that -- the 40-
hour week put in by the prior administration, and it was not
eliminating exemptions that have existed for the past
quarter-century.

In sum, I’d submit that there’s really no rational
or lawful way that these exclusions or exemptions, by any
name, don’t survive the January 1, 2000. The exemptions and
exclusions do survive January 1, 2000, in the absence of a
new wage order.

And we -- our associations look forward to and
would very much appreciate the opportunity to submit further
comments and meet with your staff regarding these issues, as
it affects our industry. And I want to thank you for your
time and indulgence. If you have any questions, I’d be
happy to address them.

COMMISSIONER BROAD: Thank you, Mr. Sulzer, for a
very cogent presentation. Let me ask you a couple of
questions.

Other than these four industries, what exclusions
that don’t exist in wage orders are there? For what sort of
occupations?

MR. SULZER: Other than are set forth in wage
orders or --

COMMISSIONER BROAD: No. We have this admittedly
peculiar situation, perhaps unique situation, in which we
have these four industries that were excluded, that is to
say, by comments of members of the Industrial Welfare
Commission over a period of years, but they’re actually
unlike, say, public employees or the trucking ones. There
actually is nothing in the wage orders that refers to any
exemption.

Are there -- you said that there were other
occupations that are treated similarly that have been
excluded, even though they’re not specifically exempted.

What are they?

MR. SULZER: Yeah, I didn’t -- I don’t know -- I
don’t know of any. If I said that, I misspoke. I think
these four industries are -- those are the four that are not
explicitly mentioned in a -- in the body of a wage order itself. They are mentioned in the “Statement of Basis” for the minimum wage order, so there is some express, formal, public, if you will, written acknowledgment that these exemptions or exclusions exist, and coupled with the actions of the DLSE, there is the level of formality, I think, that’s necessary, is there from a legal standpoint. And that may, you know, estop DLSE, or based on some other legal theory, prevent them or preclude them from prosecuting these types of actions, in absence of action by the IWC.

COMMISSIONER BROAD: Okay. So, unless we discover something different, this is the universe of this particular problem, is these industries.

MR. SULZER: I think that’s correct.

COMMISSIONER BROAD: Okay. Now, let’s go to AB 60. Clearly, AB 60 is a statute of general application that applies to all workers in the State of California. And it applies the 8-hour day, that there are specific exemptions. Then, in Section 9, which would be new Labor Code Section 515(b)(2), which I think is the -- this is where it all comes down to:

“Except as otherwise provided in this section and in subdivision (g) of Section 511, nothing in this section requires the commission to alter any exemption from
provisions regulating hours of work that was contained in any valid wage order in effect in 1997. Except as otherwise provided in this division, the commission may review, retain, or eliminate any exemption from provisions regulating hours of work that was contained in any valid wage order in effect in 1997.”

So, the question is whether, in this sort of peculiar situation where we have an exclusion that isn’t an “exemption,” quote-unquote, “contained in any valid wage order in effect in 1997,” there’s at least a strong argument that, as of January 1, these industries are covered by the terms of AB 60, and that if we wish to exempt these industries, they have to be exempted through the normal process of amending the wage orders to exempt them.

MR. SULZER: I guess I would turn it on its head. I mean, the wage orders are reinstated until otherwise dealt with by the IWC. That exclusion is the same thing as an exemption from a legal standpoint. I would argue it’s the same thing as an exemption, basically because of all the evidence, all the history. It’s just an exemption by another name. It’s kind of form over substance, if you will, to argue that it’s not -- it’s not an exemption.

Beyond that, I think that’s, you know, part of the
enabling legislation, to let the IWC act on it. And the
intent is to have the IWC act before these, you know, Wage
Order 4, which excludes our industry, is changed.

COMMISSIONER BROAD: Well, I guess that’s probably
-- in this respect, you can turn it on its head once again
by saying, “How could the IWC exempt anyone without
convening a wage board, except to the extent that the
Legislature has granted explicit authority in this bill to
do something?,” so that perhaps the IWC’s action, if they
took any, or nonaction over the years, in effect deprived
workers and employers of the rights they have statutorily to
meet in wage boards to effect changes, which -- some of
which, if they vote by a certain amount, are binding on this
Commission, whether the Commission agrees with them or not.

So, by that argument, we could start willy-nilly
creating exclusions just be standing up here and having the
chairman read a statement that says, “Well, we really don’t
want to cover, you know, people that are flying trapeze
artists or whatever, whoever they might be.” So, that’s
very troubling to me, from a kind of orderly way that one
should deal with statutes and their administration, and
regulations and their administration.

MR. SULZER: Dealing with it in an orderly fashion
is really what I think meets what’s appropriate here, is
that exclusions are in place, industries relied on them for
a long time; acting hastily on it without doing appropriate investigation to determine what exemptions are appropriate in the future should go through that, the process that the IWC should go through to make changes, if any, to what we believe the current state of the law is.

We ought to do that in an organized and businesslike fashion so that we have all the information, because, you know, on the one hand, there’s never been a valid wage board convened to regulate our industry in any event -- in any event. We’re excluded from Wage Order 4 by that action. Wage Order 4 is reinstated, and if we get Wage Order 4 reinstated, we’re specifically excluded from it. That should continue until there’s some action by IWC.

Does that answer at least some of your question?

Okay.

COMMISSIONER McCarthy: Yeah. I just -- just a couple questions by way of clarification. So, actually, as I understand what you said, for quite a lengthy period of time, your industry has acted under the assumption that you had an exemption.

MR. Sulzer: Correct.

COMMISSIONER McCarthy: During that period of time, was there any government agency dealing with labor issues that challenged your operating under that assumption?

MR. Sulzer: That challenged that? I’m not aware
of any. I’m certainly aware of legislation that said, “We should regulate these guys,” that was passed and vetoed. So, there’s some legislative activity, governmental activity, on this particular exclusion that everyone understand was in state law.

COMMISSIONER McCARTHY: Well, I think what I’m getting at -- and correct me if I’m in error, because I think this is a pertinent point, but essentially, in terms of official action from government bodies, for all of the length of time your industry operated under the assumption you had an exemption, for all that length of time, official government agencies basically didn’t challenge your understanding.

MR. SULZER: I think that’s correct.

COMMISSIONER McCARTHY: In terms of official action.

MR. SULZER: I think that’s correct.

COMMISSIONER McCARTHY: So, they were -- so, basically, I mean -- you know, one can’t get into the minds of everybody, but in terms of their overt actions, they were certainly thinking of this premise, and by not challenging it, basically, putting you on notice that -- or failing to put you on notice that you needed to seek some other recourse.

MR. SULZER: I guess, Commissioner McCarthy, I
would -- to say that we were challenged implies this was never discussed. It was. I mean, I think there -- in the IWC -- we’ll submit that with our written comments and we’ll flesh it out -- I know there was discussion, “Should we regulate these guys?” Some say “yes,” some say “no,” there’s discussion, debate. The answer has always been “no” from IWC, and the DLSE took that, and that was its enforcement policy, following that policy.

So, there’s been discussion, legislative activity on the issue. People have challenged it, saying, “We should regulate these guys,” but they’ve never been regulated. The result of these challenges, if you will, has been that these exclusions or exemptions have stood. I am not aware of any lawsuit challenging this.

COMMISSIONER McCarthy: Well, I guess what I’m saying is, a reasonable assumption would be, or seems to be, that you were operating correctly in your understanding.

MR. SULZER: Absolutely. Absolutely, and understood that this to be the state of the law, based on all of the evidence that I’ve mentioned and summarized very briefly but we’ll submit in written comments, that we rely on that, and that survives January 1, until the IWC acts. And if it doesn’t deal with this exemption, then it should continue as it has, as the current state of these orders.

COMMISSIONER CENTER: Just a couple comments. I
think it’s -- we’re probably safe to assume whatever action
IWC takes in January, it will be challenged in court.

MR. SULZER: It depends.

COMMISSIONER CENTER: Well, by you or not, by some
other party. And I think that understanding these
industries were never intended to be covered -- you know,
looking at this article in the Sacramento Business Journal,
and one statement they made is, “Construction companies
won’t be exempt any more. However, when the state’s daily
overtime law takes effect in January, in January they’ll be
covered.” So, it’s -- there’s going to be disagreement all
over the lot on this, and we’re finding that in the comments
we’re receiving.

But I think what we want to do is take as much
input from the industry, from labor, from affected parties,
and make the fairest decision we can, make the decision
where we’re going with it.

MR. SULZER: Right. And our one request is
basically that we do it in a businesslike fashion. On the
one hand, employees -- nobody’s -- nobody’s been hurt on
these exclusions, and there’s a lot of information from our
employees, for example, some that we will submit, will be --
we give every -- we give people a choice, you know, “Do you
want the seven days, seven days off?” They want it. That
-- and that’s never been the subject of a wage board or any
hearings, as far as -- as far as I know. And we'd hope that you would go through the process, probably post-January 1, dealing with this issue, or not.

COMMISSIONER CENTER: In the finding “nobody’s been hurt,” I worked in the construction industry for twelve years. But under collective bargaining agreements, I received daily overtime, and the people who were non-regulated did not. So, I made a whole bunch more money than they did. To find “not being hurt,” you know, it’s all perception.

Any other comments from --

MR. SULZER: I think that’s what we intended to submit today. We’ll submit some written -- further written legal argument, additional, and a packet of the evidence I’ve discussed and whatever other research we’re going to find from archives describing, one way or the other, about these exclusions.

COMMISSIONER DOMBROWSKI: Could you also -- could you also make sure you reference AB 60 and your -- AB 60 and the exemption that you’re looking for?

MR. SULZER: Currently? In the reinstatement --

COMMISSIONER DOMBROWSKI: Your interpretation.

MR. SULZER: -- of the wage orders?

COMMISSIONER DOMBROWSKI: Well, your interpretation of --

Okay. We thank Chairman Centers and members of
the Commission and staff for this opportunity.

COMMISSIONER CENTER: Thank you.

I think it’s Tim Long, with Orrick, Herrington,
Sutcliffe, and the Retailers Association.

MR. LONG: Good morning.

COMMISSIONER CENTER: Can you put that -- yeah,
move the mike in as close as you can.

MR. LONG: Better?

COMMISSIONER CENTER: Yes.

MR. LONG: Good morning. I am here again today,
as I was last week, on behalf of the California Retailers
Association, and I’d like to summarize verbally what I’ve
presented to you in writing, and then follow up my comments
-- we have some folks here from Longs Drug Stores who will
introduce themselves and present testimony consistent with
and in support of the position that we have summarized
heretofore and in the submission here today.

What I’ve provided to the Commission is a first

crack with regard to defining administrative duties. And we
believe that it would be appropriate and lawful for the IWC
to adopt, as a definition for administrative duties, the
proposed definition.

Now, at last week’s hearing, the legality of
defining the administrative duties differently than the U.S. Department of Labor defines the administrative exemption was called into question. And so, attached to the letter is a legal analysis, summary of a legal analysis of this very issue. And in a word, we believe that the law shows that it would not be preempted and would be perfectly enforceable.

And under this proposed language, as I said last week, licensed pharmacists who are engaged in specific duties -- and those duties are reiterated at Pages 2 and 3 of the cover letter -- and who are, in fact, spending more than 50 percent of their time engaged in those duties, would be exempt, recognizing that not all pharmacists would qualify for this exemption, for any variety of reasons, many of which are perfectly appropriate.

We also believe -- and you all heard testimony from licensed pharmacists last week -- that allowing licensed pharmacists who are primarily engaged in specified duties to be exempt allows them more flexibility and furthers a wide variety of important interests.

So, with that said, if you have any questions at this point with regard to either the legal analysis or the submission I provided to you last week, I’d be happy to address them. If not, we’ll turn it over to those folks who will testify and give you some facts and examples about what the impact would be, both if they were classified as exempt
employees or if they were classified as nonexempt employees.

COMMISSIONER CENTER: Questions?

COMMISSIONER BROAD: Well, Mr. Long, I’ve read your submission last week, and it’s similar. What you’ve added on is this issue of -- this response to the question of federal preemption.

It looks to me like this is -- you’re asking the IWC to repeal a statute by regulation, and it looks to me like it’s a subterfuge, because I don’t believe that this would exempt any pharmacist in the State of California, because these various duties that you mention are the duties that distinguish pharmacists from anyone else.

The statute flat-out says that pharmacists cannot be exempted by the IWC; the IWC has no power to exempt pharmacists as professionals. What you’ve done is bootstrap onto the administrative exemption the definition of professions, so there would not be a pharmacist at all who would be covered. In my view, it would violate SB 651, not to mention the various agreements between management and labor that accompanied the passage of SB 651 as it made its way through the Legislature. It seems as though there’s an effort to sort of back away, as it were, from a bill that was agreed to by the industry.

And the consequence of this would be to allow pharmacists to continue to work any number of hours per day,
with no breaks, and no meal periods. And I know from my own
experience, after the passage of SB 651, I went to a Rite-
Aid pharmacy, mentioned it to the pharmacist and the
pharmacy technician, and the pharmacist said, “Oh, we were
just talking about the problem yesterday; I just came off of
five 14-hour days, and I’m dead tired. And this is the best
thing that’s ever happened.”

So, I can understand the industry coming forward
and saying, you know, “We want this kind of accommodation or
whatever, based on the expressed interest of all the workers
in that industry.” For example, hospital pharmacists should
be entitled to all the alternative workweek arrangements
available to all people who work in hospitals. That makes
sense to me. But to exempt them flat-out by calling
professionals administrators is to really, in my view,
contort the law.

MR. LONG: Well, the IWC has the opportunity to
define all of the exemptions, the duties, under which -- and
we have proposed a definition of administrative employees,
or the administrative duties that we would believe exempt
certain pharmacists.

I can’t comment in terms of deals and what-have-
you. I’m just here proposing what we think is a perfectly
lawful, legal, sound, and it makes sense, approach.

If a licensed pharmacist is not spending more than
50 percent of his or her time engaged in these duties, that person is not exempt. So, for example, if somebody is merely doing the counting, pouring, licking, and sticking, following instructions and what-have-you, under our proposal, that person would not be exempt.

COMMISSIONER BROAD: How’s that? That is what is defined as the practice of pharmacy. That is exercising professional judgment. No one but the pharmacist can check that to determine whether it’s the appropriate medication.

MR. LONG: Well, we will have some pharmacists here who will talk to you about what the duties are and what pharmacists are engaged in. Pharmacists do far more than follow the instructions of a physician. They do far more than just fill in the containers. There are many other duties that they are engaged in that require them to utilize their specialized training, to exercise their discretion and independent judgment in the carrying out of those duties.

Now, again, if a pharmacist is not engaged in those duties more than 50 percent of the time, they wouldn’t be engaged -- or they wouldn’t be exempt, rather.

COMMISSIONER CENTER: Any questions?

COMMISSIONER McCarthy: Just one. I’m looking over the criteria you’ve put here to justify this definition as an administrator. You have, among other functions that they perform, is they interpret a prescription. Now, one of
the unfortunate things about growing old is that you visit
the pharmacy ever increasingly, and I’ve had many a
prescription. I didn’t realize it required a great deal of
interpretation. Could you elaborate on that? I mean, it
says -- you know, it’s so many tablets of such-and-such.
And where’s the interpretation? You make it sound so
complex.

MR. LONG: I tell you what. I would ask -- if you
could ask that same question to a pharmacist -- I don’t
pretend to sit -- stand up here as a pharmacist and -- in
terms of what it means to interpret and what-have-you. But
that’s an example of the type of duties that would fall
under the administrative exemption, as we’re proposing.
If I -- this is just an example of a type of
administrative employee.

I would ask you to re-ask that question to one of
the pharmacists who will be testifying here as well.

COMMISSIONER CENTER: Thank you.

MR. LONG: Thank you.

MR. FONG: Good morning. My name is Dave Fong,
and I’m the senior vice president of Pharmacy for Longs Drug
Stores. Longs Drugs has approximately 1,400 pharmacists
working for them, and we believe that we are not only a very
good employer, but also a very good company when it comes to
developing a working environment and a professional
environment for our pharmacists to practice within.

I am a pharmacist. I’m a graduate of the University of California Medical Center, here in San Francisco, with a doctorate of pharmacy, and I’ve been practicing for approximately the last 22 to 23 years, both as a pharmacist as well as a pharmacy executive.

My comments here today are to support the position that Tim Long has presented to you, having pharmacists classified as exempt employees, for the following reasons.

One is, I -- you know, to give you a little background, I didn’t go to pharmacy school to count, pour, lick, and stick. I went to pharmacy school because I believed that I could contribute towards improving health care out there in the community. That was 1975, and back then, you know, it was count, pour, lick, and stick versus “What’s going on and what can we do to improve the health care of America?” And as a pharmacist, I recognized that the education, but more important, the role of the pharmacist, was continuing to evolve, and that pharmacists were going to be much more actively involved in enhancing the health care of consumers in America and in the world where we operate.

Our practice, what I learned in school wasn’t just what I call the count and pour, but then, in fact, the curriculum included very little on that. It was mostly
spent with understanding how to use the information, the
clinical information on drugs, how to apply that to each and
every patient, to be able to understand and work within case
histories and case management and disease state management
to manage patients more effectively, and to work very
closely with the other health care team, including the
doctors, the nurses, and others, to improve the overall
welfare of patients that we serve.

Now, I won’t deny that over the last several
years, that the perception of pharmacists being only the
count-pour-lick-and-stick, all you see them is behind a
five-foot wall, all you see are the pills popping over the
counter. And, gee, what else do they do, and do they really
play an important role in health care?

And the fact is -- and you’ll hear from a
practicing pharmacist -- what really does go on besides just
the pills coming over the counter. Pharmacists are much
more actively today than ever before involved with managing
patients’ welfare. They are the most accessible and
available professional, as determined by the Gallup poll.
Given what’s happened with managed care and what I would --
I would say the minimal opportunity to visit with doctors
and other healthcare professionals, the corner drugstore
pharmacist becomes much more of an active participant and
accessible to consumers, when it comes to not only their
prescription care, but also the OTC products that they buy. And I think many of you have had the experience of going into a drugstore, you go down the cough and cold aisles, and all you see are colors. And you say, “Which is good for me, considering I’m a diabetic?” Do I ask questions? Gee, who can help me in order to ensure that I’m getting the proper product? That is the role of the pharmacist. That is the role of the pharmacist to be accessible and available. But the fact is, today it’s not happening to the degree that we would like.

Yes, I do have pharmacists that perform immunization, I do have pharmacists that are involved with managed care and with disease state management, and they’re -- what we call clinical coordinators, working with patients and doctors. But, in many cases in the retail, at the drugstore, the pharmacists, not only are they responsible for their professional responsibilities, as mandated by regulation and law, but they probably spend a lot of their time doing the count-and-pour. Why is that the case? The reason is plain and simple: we currently have a shortage of pharmacists in the State of California, if not in America. And I have documents in front of me that share with -- that can share with you what’s going on, with a 44 percent increase in prescriptions over the next four to five years, coupled with only a 6 percent increase in pharmacists that
are going to be available to service the patients who continually want more pharmacy care.

We talked about the aging Baby Boomer and the number of prescriptions that are going to be filled for the aging Baby Boomer, as well as other factors that are impacting on increasing -- not only the numbers of prescriptions, but also the demand for pharmacy services and the need for accessibility, pharmacists to assist and to care for these patients.

Unfortunately, in this state we have restrictions that limit how many pharmacists -- not how many pharmacists, but the number of pharmacists that are available to us. We do not have reciprocity with other states. There’s only an exam, and that’s the exam you have to pass in order to work in this state. We have a technical ratio now. The technicians would do the count-pour-lick-and-stick, but considering, right now, we have what’s called a one-to-one ratio, which means you can’t have more than one tech per pharmacist, if you don’t have the pharmacist, you don’t have the tech. And therefore, who is doing the count-and-pour?

So, obviously, because -- and again, the relationship we have with our patients, the care we have with our patients and the need to take care of them when they demand and expect that service, we end up doing the count-and-pour or doing whatever it takes to make sure that
that patient is getting the level of care that they expect from us.

Yes, we can do a much better job. Yes, we can be much more actively involved with our health care, but the fact of the matter is that in regulations today there are some reasons, restrictions that prohibit us from doing as much as we can.

I also want to share with you a white paper that was produced by NACDS, our national association, that really talks about community pharmacy practice in the U.S. and what is our role, but more importantly, what must be our role as we move forward, and what are the factors that must be considered if we are to achieve that objective of really enhancing the care of our patients in the U.S. And I can leave that with you, if you’d like, so you can read a little bit more and understand a little more on pharmacy. Okay.

And finally, having to do with flexibility of scheduling, we recognize that SB 651 has passed. Okay. We are now going to adapt. What we are very concerned about is flexibility. If we are taking care of the patients, and if we have an issue right now where people need their service right now, this minute, this moment in time, and because of the inflexibility of scheduling, we’re not able to provide that because someone has called in sick or someone is not available, or we have to work extra hours because there’s a
shortage, that that has occurred. There needs to be more flexibility by the staff on covering and to make sure that they are providing the necessary services to take care of the patients in their community.

Our company not only supports, but allows, our pharmacists to develop the schedules, in order to make sure that we address not just flexibility in being there, but considering, you know, their quality of life and their own personal life, but also to make sure that we’re taking care of the patients as well, and that the coverage represents them.

We believe that we will not have that level of flexibility in the new law. We believe that the alternative work schedule protocol that’s been outlined in here is too cumbersome and does not provide enough flexibility and timely response in order to address the needs, not only of the professionals, the pharmacists who are trying to take care of the patients, but really demand by the consumers on wanting that service now, not a day later or two days later, or, “I’m sorry, I can’t help you because our pharmacies have to close because we don’t have enough pharmacists to cover the hours in order to provide that service to you.”

So, in conclusion, what I would like to comment and really say is that we believe, one, that pharmacists are, in fact, contributing to good health care, that we use
our discretion and judgment each and every minute, hour, day, in taking care of the needs of the patients. Maybe we don’t do as good of a job as we should, but clearly, there are some reasons why that is not happening today. But we continue to move forward with the understanding that we will do a much better job, and we just need help from you in order for us to be able to achieve that, and a little flexibility in the process.

Questions of me?

COMMISSIONER BROAD: Do you have pharmacists at Longs working 12- or longer-hour shifts per day?

MR. FONG: Yes, I do.

COMMISSIONER BROAD: Do you think that they get tired working 14, 15 hours a day?

MR. FONG: The answer would be, logically, yes.

COMMISSIONER BROAD: Do you think it’s possible that if they’re that tired, that they could be making errors or it could be causing them sort of physical harm to their bodies, working those kind of hours day after day?

MR. FONG: To your question, possibly, yes.

COMMISSIONER BROAD: So, then, it’s something that we should be considering.

MR. FONG: Absolutely. But let me comment on that, and I think this is what is absolutely important. And we will have a practicing pharmacist before you, but I --
but I would recommend you talk with pharmacists out there. Why are they working these hours? Is it because they want to, or is it because there’s factors that are requiring them to do that? I have pharmacists say, “I don’t want to work the extra hours, I don’t even want the extra pay; give me my time off.” But at the same time, they also recognize that they are healthcare professionals in the community trying to take care of the patients. They have a relationship with the patients in those communities.

And every one of you have relationship with your pharmacist, and, more important, they with you. They want to make sure you’re taken care of. And if it means taking the extra step or doing something more, they’d rather -- they would do that.

But the other point is, we don’t have enough pharmacists right now, or technicians, or enough -- what I’ll call folks that assist in order to reduce the number of hours required for a pharmacist to service our patients in the community.

COMMISSIONER BROAD: Well, I can understand addressing that question elsewhere, at the Board of Pharmacy or in the Legislature. But it does seem to me -- I mean, you know, I don’t know if you’re aware of this, but there’s a provision in the Labor Code -- it’s been there since 1937, before the passage of the Fair Labor Standards Act, before
California’s IWC regulated industries employing men at all, that limited the number of hours of work in a pharmacy. So, we’ve been regulating by statute and limiting the hours in this industry for, you know, the second two-thirds of the 20th Century, because there’s a concern that there’s a public health issue involved in working pharmacists to the point of exhaustion.

And it seems to me what you’re suggesting is that we -- that what you’re doing is respecting the free choice of pharmacists, but you would like us to do nothing that ensures that their free choice is actually respected. In point of fact, what you can do is say, “Work 14 hours or you’re fired, work 15 hours or you’re fired; I don’t care how tired you are, that’s what the shift is. If somebody -- you don’t take breaks, too bad, you know, I don’t care what your problem is. You’re here for lunch, you’re here for breaks. And if somebody wants to have a prescription filled, it’s too darn bad.” And that seems to me to be -- it’s those sort of conditions that the Legislature found were unacceptable.

MR. FONG: Two comments on that.

First is, you are aware that that Board of Pharmacy has -- through the Legislature, has promulgated regulations to provide for lunch breaks and other breaks.

COMMISSIONER BROAD: Only -- only -- I was
involved in drafting those regulations --

MR. FONG: Yeah, I know.

COMMISSIONER BROAD: -- and working on them, so I
know that only for breaks and meal periods mandated by the
Industrial Welfare Commission. So, you’re coming here and
saying they’re no longer mandated, which means it’s gone.
Poof!

MR. FONG: The second comment I will make is
having to do with flexibility and choice for pharmacists who
have really been attracted into our profession. And we
question whether we will continue to have the number of
pharmacists that can work within our practice. And that has
to do with women pharmacists. Approximately 60 percent of
the enrolling classes right now in pharmacy school are
women. The number of pharmacists within my company continue
to grow as a percentage of the total.

There is flexibility that’s needed, a choice by
them on when they want to work, but more importantly, the
hours that they’re willing to work. And I won’t limit it
only to women. Really, it’s parents who have young kids who
need the flexibility to take care of their families and that
whole quality of life part of their life.

And we believe that this will restrict, if not
limit, the number of available pharmacists willing to work
part-time with flexible hours, because that will not be as
attractive as it has been in the past.

Thank you very much.

COMMISSIONER COLEMAN: I have a comment.

MR. FONG: Oh, I’m sorry.

COMMISSIONER COLEMAN: The situation described, about the 15-hour days, reminds me very much of the situation that many doctors are in. Having lived with a woman who was going through her residency and then her first several years of being a doctor, she had to routinely work 24-hour shifts, emergency room, and, you know, sometimes I would wonder whether or not I wanted her working on me if I was dragged into the emergency room at 4:00 a.m.

But that decision, we, as a state, have given that discretion to the hospitals to regulate the hours of the interns and the doctors. So, I guess the question here is, are we -- is this something that the IWC is -- to what extent does the IWC regulate this or to what extent do we leave that decision to the professionals and the pharmacy industry? That seems to me to be one of the fundamental questions that we have.

And a point of clarification. The last several speakers are basically appealing to the Commission to institute exemptions for particular industries. I just want to clarify that, in my understanding, is -- you know, that is within the realm of what we can do, with or without wage
boards, depending on the actual exemption. And I just --
before everyone else comes up and continues to ask us for
exemptions, I want to make sure. Is that a correct
interpretation of this?

COMMISSIONER CENTER: Yes. But that answer
probably is if that’s what we want to do, because in the
industries -- there’s five industries we do that without
wage boards that were stated in the law. But our
responsibility still here is to protect the welfare of the
workers in California.

COMMISSIONER McCarthy: I just have one comment,
because you’ve referred frequently to the shortage of
pharmacists in the state. And I guess the question I have
is, how are you going to encourage more people in California
to pursue a pharmacy career if one’s requiring mandatory
overtime without overtime pay? I mean, it seems to me
you’re making the position less attractive rather than more
attractive.

MR. FONG: There’s been a number of initiatives,
both within the state as well as nationally, to try to
attract more people into pharmacy. In every state except
two, there has -- there is now a shortage.

Congress just promulgated some evaluation and
surveying to find out what the magnitude of that shortage
is, and, more importantly, what actions should be taken if,
in fact, the shortages are acute enough that it impacts on the healthcare of the consumers of America.

Internally, we’re out there talking with pharmacy schools, trying to get them to expand on the number of students that they would enroll. But as you know, bricks and mortar and buildings don’t come up overnight; it’s a process that takes a while. And UC, because it is a state school, it has its other challenges with fiscal budgeting and all of that. We’re getting -- we’re actually attracting -- recruiting down at the high school level to try to get high school kids to work in pharmacies, to get some exposure to what goes on back there, but to give them a good experience on how they can contribute to good health care.

I mean, I did that. I was a delivery boy at a pharmacy in Hayward, California, and I learned what happened in the pharmacy and how I could make a difference in helping my patients out there. And that’s one reason why I went to pharmacy school.

COMMISSIONER McCARTHY: No. My only point is, wouldn’t an 8-hour day be more conducive to a lot of people, especially the number of women you mentioned, many of whom will have family responsibilities?

MR. FONG: Yeah.

COMMISSIONER McCARTHY: Wouldn’t an 8-hour day be more conducive to people pursuing responsibilities than
mandatory, say, 12-hour shifts, especially --

MR. FONG: You know, that’s a good question. And at this point, I haven’t even focused on that. I’m more focused on, you know, who out there -- how can I promote pharmacy as a profession and as a contributor to health care, and who out there want to make a difference in good patient care. And I really have not gotten into, you know, how many hours of the day are you going to work. That really has not been my objective.

COMMISSIONER McCARTHY: I see.
COMMISSIONER CENTER: Thank you.
COMMISSIONER McCARTHY: Thank you very much.
MR. BLACK: Good morning. Good morning, ladies and gentlemen. My name is Duane Black, and I’m one of the people you’re talking about. I’m a pharmacist in California and have been for the last 45 years. I have been a pharmacy manager for Longs Drug Store up in Novato for the last 32.

I’m real lucky, in that I have reached an age in my life where I don’t have to work. But I’m a little crazy, so I continue to work. So, what I am going to tell you today, or at least express my opinion, will not be affected by the fact that I’m afraid Dave Fong, sitting behind me, is going to fire me, because, in fact, I’m trying very hard to talk him into letting me work fewer hours.

I didn’t know I was going to be here today until
last night. And I started thinking, well, what would you folks like to hear about pharmacists, because most of you, what you’ve really seen is the little bottle of pills you get when they throw them at you through the window in the pharmacy.

I wrote an article about fifteen years ago, which was -- made the papers and then some of our internal publications -- that said, “There’s a lot more in this bottle than just pills.” And it showed a bunch of pills spilling out of the bottle. But what you get in that bottle besides pills is you get me. And me, I am, and my colleagues are, the experts on prescription drugs and over-the-counter drugs. It’s our job to make sure that all the laws are followed, that everything that we give you is going to improve your health and make you well. And in so doing, we’re not just counting, pouring, and filling. We’re doing a whole lot more.

Mr. McCarthy, you mentioned the interpretation of a prescription. I know, from a layman’s standpoint, you walk in, there’s a piece of paper that the doctor gives you that says, “Go get some pills.” A lady told me it also said, “I got your money, now you” -- I mean, “I got my money, now you get yours.” But that’s not anywhere included on the paper.

(Laughter)
MR. BLACK: The interpretation part comes when I look at that piece of paper, and it says something like "Celebrex" -- this is the new drug for arthritis. And off to the side, it says, "5 milligrams, take one tablet three times a day." Well, the interpretation comes -- "Gee, that’s funny, doc, they don’t make a 5-milligram Celebrex, and we don’t give it three times a day. What did you really mean by this prescription?"

So, I call him and say, "Do you" -- well, first I talked to you, John, and I said, "John, how’s your arthritis?" "Well, I’m not being treated for arthritis."

So, I say, "Let me take a -- make a call to your doc." So, I call the doc and I say, "What did you really mean with this prescription for John?" And he says, "Oh, I don’t mean Celebrex, I mean Celexa," an anti-depressant.

That’s the interpretation of the prescription, and it happens all the time, before you ever get a little bottle of pills in the pharmacy.

In addition to that, we check the drug interactions with what you’ve had. Fortunately, with the advent of computer systems, we are much more sophisticated in the way we can check the medicine that you get. Nowadays, with almost everyone being covered with an HMO, much of my time is spent negotiating with HMO’s and prescribers which drug we’re really going to give you, John,
because your pharmacy -- I mean your HMO -- doesn’t cover this new arthritis drug. So, I have to call the physician and tell him what is covered, and look back at your records to see if you’ve failed on any of the other drugs in this class, and determine whether we should try you on one of those or whether the doctor should go to all the trouble of trying to get a special authorization from your HMO. All of that’s done before you ever see the pills in the bottle.

Finally, when it’s a new prescription and the pharmacist feels it’s appropriate, he’ll come out and talk with you about that medicine, consult with you about some of the other medicines you’re taking. We as pharmacists are probably the most accessible health professionals, in that we’re there. All you’ve got to do is ask for us. I spend I don’t know how many hours a day answering questions for folks and taking calls on the phone.

There’s a couple of examples of things that we do I’d like to briefly tell you that shows you that we do a lot more than just count and pour.

A lady in her thirties at our store suffers from severe lupus disease, which is a degenerative disease of the organs and joints, and is in excruciating pain. She was taking multiple prescriptions from multiple doctors, taking huge quantities of narcotic painkillers, was even going to Mexico to get muscle relaxers that her physician here would
not prescribe. Because our pharmacist knew her, knew her
history, had talked to her when she gets medicine, we talked
with this patient and said, “Susie, you’re addicted to all
this pain medicine, and yet you’re not getting any pain
relief. I think we should work with your doctor to see what
we’re going to do for you.”

So, my staff and I got together, called her
physician, and said, “You know, this patient shouldn’t be on
all these tons of painkillers. Let’s put her on morphine
itself, which is a far better drug for her particular
condition and for the rest of her life.” And we did that.
Well, the lady is now able to lead a functional life. Her
lifespan is not expected to be very long. But it was the
intervention of my staff and working with the physicians
that helped this lady achieve this goal.

In another example, we have a welfare patient, or
a MediCal patient, who was very mentally ill. This lady was
a real pain in the derriere, and she kept calling our
pharmacy and renewing prescriptions and taking too much of
the medicine, and wasn’t getting any better. Here again,
our pharmacy staff showed concern that this lady — number
one, she’s a real pain; number two, she’s taking way too
much medicine; and, more important of all, number three,
she’s not getting any better.

So, we talked with her psychiatrist and with her
physician and said, “Look, we’ll set up a box of pills to send out to this lady every week so that she doesn’t take too many pills. And we’ll take that upon ourselves to do that, to see if we can control how much she’s taking.” We did that. She got a little bit better. She wasn’t abusing her pills quite so much.

She was still pretty loony, though, so my staff and I decided, “You know, there’s a couple of new drugs that are now available on MediCal that I think, doc, we ought to try and maybe eliminate some of these older ones.” Well, in this lady’s case, it was a miracle. The new drugs worked. The old drugs, having been removed, removed a lot of her bad symptoms she was having. The lady today is still mentally ill, but she’s able to take care of herself, function socially, and it won’t be too long until she’ll be a productive member of our community again, and, with luck, off MediCal.

You folks are here today to try and determine the best way to implement work hours for people like me. I heard mention of the 14-, 15-, and 16-hour days. That’s a rare exception in our company, as far as I know. In my particular store, my pharmacists work a 40-hour week, except when they work the long weekend, in other words, 11 hours on a Saturday and 10 hours on the Sunday -- by our own choice, may I say. And when we do work that long week, the
following week we pretty much take the whole week off,
Tuesday, Wednesday, and Thursday. So, this schedule is
flexible. And that’s what I would like to see come from
your group, is allowing me the flexibility to continue to
practice pharmacy the way I want to.

One of the reasons I stayed with Longs Drug Store
all these years is they did just that, they allowed me the
flexibility. As long as I perform my duties legally and as
long as I make money, I can run that pharmacy any way that I
want, and, in fact, still do.

I don’t -- and I don’t think the other pharmacists
on my staff -- want to have to punch a time clock. I, and
I’m sure the other members of my staff, would like to
continue the flexibility to work whatever schedule we agree
upon among ourselves.

Now, having said that, I applaud your efforts to
redress some of the wrongs which I know have occurred within
our industry, where pharmacists were being forced to work
hours that they didn’t want to. In my experience with my
company, in those instances where pharmacists have had to
work longer hours, it’s been to cover illness, it’s been to
cover a shortage of pharmacists, and they have always agreed
to it -- maybe haven’t always liked it, but we’ve always
agreed to it.

So, I guess, in closing, is I’m a pharmacist; I’m
very proud of being one. Allow me the flexibility to continue to practice the way I do now, and keep your efforts to provide some safeguards in such a way that it allows me to do that.

Thank you.

COMMISSIONER CENTER: Any questions?

(No response)

COMMISSIONER CENTER: Thank you, Mr. Black.

MR. POPE: Good morning. My name is Alan Pope. I also work for Longs Drug Stores. I’m going to give you a little bit of my background, just to let you know where I’m coming from. I was educated as a pharmacist at the University of California San Francisco School of Pharmacy, and obtained my Pharm.D. degree in 1978. And I practiced at Alta Bates Hospital in Berkeley for eight years, and occasionally with Kaiser Hospital I’d fill in. I later went back to school, at the University of California San Francisco Hastings College of the Law and became an attorney. I’ve been an attorney for Longs Drug Store for approximately ten years. I am now assistant general counsel. I handle all types of pharmacy matters, including claims of pharmacy malpractice or prescription errors, pharmacy licensing matters before the Board of Pharmacy, and wage and hour matters that occasionally come up. That’s a little bit of my background.
I’m here to support what the prior speakers have said regarding CRA’s position that the IWC recognize that pharmacists may fit into the administrative exemption because their duties involve primarily discretionary tasks. And from what I’ve heard this morning, I think the members of the IWC may be under the mistaken profession that pharmacists perform primarily production tasks. That is not the case. As Duane just mentioned, pharmacists perform a number of other tasks. If you want a pharmacist to dispense a drug and that’s it, a robot can do that. With the technology that’s available today, robots can dispense drugs accurately. But that’s not what pharmacists do. That’s not the only thing that they do. Actually, technicians can do that.

Pharmacists evaluate prescriptions when they come in. They interpret them. I’m not going to address that because Duane did, but they look at the medication, the medication that was ordered, based on the age, based on the gender, based on the physical condition of the patient, and based upon the disease states. Now pharmacists -- the role of pharmacists is expanding into disease state management.

For example, if you are diabetic or you have asthma, in some states now, you can go in to the pharmacist, the pharmacist will perform a brief physical evaluation and make recommendations to the physician, and, in some cases,
be able to change drug therapy for that particular patient
based on their disease state.

Pharmacists check on drug-drug interactions. They
check on drug-disease interactions. They check on drug-food
interactions. They also supervise technicians routinely,
because the technicians are really the ones who are supposed
to be filling the prescriptions. They consult with
physicians. In addition to what Duane mentioned, I’ve had
doctors call me when I was practicing as a pharmacist,
doctors call me and say, “Alan, I’ve got this patient in
this condition, I want to dispense -- I want to give --
prescribe this drug. Do you think that’s okay?” “No, I
don’t think so. I think you’re really better off doing a
different drug.” And that’s what we would do, we would
recommend. That happened in the hospital routinely because
pharmacists were available and on the first floor, at that
time.

We also advise patients on proper use of OTC
medications. Dave Fong mentioned that. That’s a very
important -- very important aspect of the pharmacist’s job.
They are available to the patient. They are the -- they are
the professional -- I don’t want to get into the
professional exemption issue -- but they are the
professional who is available, most available and most
accessible, to the consumer.
They are also a patient advocate. Now with third-party prescription plans, the pharmacist is the one in between who has to advocate for the patient as to particular medications that are covered by their prescription drug plan. It’s, unfortunately, a sad fact of the managed care era that pharmacists have been put in that position, but, unfortunately, they are. And they do that routinely, every day.

These discretionary tasks -- under the administrative exemption, these discretionary tasks require specialized training and they’re used every day by the pharmacists. Pharmacists are not performing production work; at least, we don’t want them to.

Now, will this mean -- if you allow pharmacists to fit into the administrative exemption somehow, will that mean that all pharmacists are -- will become exempt? No, they won’t. Unfortunately, the sad truth is that, in some stores, some drugstores, in some of our stores, you only have -- you may open a store with two pharmacists. They’re not going to be performing all those tasks that I said. It’s really a fact-based inquiry. And those pharmacists would probably be paid time and a half after 8 hours.

But if the IWC allows this administrative exemption to go through, it will allow the pharmacists to, hopefully, fit within that exemption if they want to -- if
they want to, and if they’re doing their tasks. Again, we
don’t think that all pharmacists will fit into that
exemption, but we would like that flexibility.

As far as scheduling, right now in our
organization, pharmacy managers, with the pharmacists, make
up their own schedules. And I’ve had pharmacists I was --
when I talk with them on the phone, and I get calls every
day -- I had, one time, a pharmacist say, “Boy, I worked
this weekend and I filled almost 300 prescriptions.” I
said, “Were you by yourself?” He said, “Yeah.” And I said,
“Well, why were you -- why didn’t you have some help?” He
says, “Well, because that’s the way we arranged our
schedule. I only wanted to work one weekend in five.” So,
on that particular day, he had worked 12 or 13 hours. And I
don’t advocate that, but that was their choice. That’s what
they wanted to do. I don’t think I’d want to do that, but
that’s what they wanted to do.

And without that flexibility, unfortunately, I
think our company would have to start mandating some
different schedules so the pharmacists are working, you
know, 8 or 9 hours a day maximum.

One of the previous speakers talked about
prescription error rates and the amount of time that they
work. I have not found that to be the case. If --
certainly, workload and staffing can affect prescription
errors, whether a prescription error occurs. That can -- no
doubt, that can happen. However, I haven’t found that to be
the overwhelming factor.

Really, the overwhelming factor is, at least in my
-- in my experience, is that the pharmacy has a procedure to
double-check the prescription. They have -- in other words,
they have proper procedures to make sure that pharmacists,
technicians, are double-checking that medication, making
sure the right medication gets to the right patient. We
have -- we’ve altered -- about four or five years ago, we
altered our dispensing procedures slightly, and it caused a
dramatic decrease in the prescription error rate.

Finally, one of you had asked about how do you
attract pharmacists to the profession if they’re working 9-, 10-, 11-hour days. There are advantages to being an exempt
employee. Actually, scheduling, you can work your own
schedule. That is an advantage. That’s what they can do
now.

If we were dictating the schedule, I’m sure I
couldn’t make that argument. But right now, they make their
own schedules.

There is an advantage to being a salaried
employee. There’s a certain -- I don’t know if you’d want
to call it status, but you could say, “Yeah, I make the same
whether it’s 32 hours a week or whether it’s 48 hours a
week.” And actually, pharmacists typically work on a rotating two- or three-week schedule. They may 36 hours one week, they may work 44 the next, or -- based on their scheduling, based on the needs of the store.

So, there are ways to attract pharmacists into the profession without having -- saying, “Well, you know, you’ll just have to work 8 hours a day.” I think the flexibility is very important.

And that’s all I have. If there’s any questions --

COMMISSIONER BROAD: I don’t know if it’s appropriate for you to address this or Mr. Long. I actually wanted to go through your proposal a little bit, your actual language that you submitted.

MR. LONG: I’ll move up.

COMMISSIONER BROAD: The existing administrative exemption says:

“The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1,150 per month.”

That’s changing to twice the minimum wage on January 1.

Your proposal extends that considerably. It says:
“Customarily and regularly exercises discretion and independent judgment in the performance of intellectual work which is office or non-manual work directly related to management policies or the general business operations of the employers or the employers’ customers.”

First of all, this is not limited to pharmacists, right?

MR. LONG: That’s correct.

COMMISSIONER BROAD: Okay. So, there’s a whole lot of other people that this may create an exemption for that we would call administrators, out there in the larger workforce.

MR. LONG: It may very well.

COMMISSIONER BROAD: Okay. Now, I guess the question I have is, what do each of these things that you’ve added do? What’s your intent?

For example, then it says “regularly and directly assists a proprietor or an exempt executive or administrator.” So, it’s not -- it’s -- someone who’s exempt as an administrator is someone who helps out someone who’s exempt? So, I mean, my question is, I hope we’re not talking about clerical employees here, because they engage in office work and they regularly -- they regularly assist executives or administrators.
MR. LONG: Well, I might point out, the touchstone starts off with “customarily and regularly exercises discretion and independent judgment in the performance of intellectual work.” By your reference to clerical employees, if you mean, let’s say, a word processor, obviously that wouldn’t come into play. If you’re talking about an executive administrative assistant to whom has been delegated the authority, on behalf of the executive, let’s say, to make decisions of consequence relating to exercising discretion and independent judgment, that would be the case. And that’s the law now.

COMMISSIONER BROAD: Well, suppose -- let’s give the example of a pharmacy technician. Would they be?

MR. LONG: No.

COMMISSIONER BROAD: Why not?

MR. LONG: Because they -- technicians are not authorized to be engaged in those duties that we’ve specified. They’re -- to use the analogy that’s come up time and again in terms of the pharmacists who have testified, the counting, pouring, licking, and sticking, the dispensing, that is what a technician can do. That’s what a machine could do.

And to the extent that a pharmacist, for whatever reason, and appropriate reasons, is doing just that, that would not count on the ledger side of whether somebody would
be engaged in exempt duties.

But Alan also wanted to --

MR. POPE: Yeah. The -- right now, the pharmacy regulations say that a pharmacy technician can only perform clerical, nondiscretionary, and repetitive tasks. So, clearly, they wouldn’t fit in with that definition, the proposed definition.

COMMISSIONER BROAD: Do you have any idea, besides pharmacists, what classes of employees this would affect, or how many? Are we talking about a million people, 100,000 people?

MR. LONG: I haven’t engaged in any studies of how many folks it would impact.

COMMISSIONER BROAD: Was it your intent to impact people beyond the practice of pharmacy?

MR. LONG: Well, I think that it would depend on what somebody is engaged in. Theoretically, you could have somebody who’s got the title of administrative executive assistant who appears by -- because of somebody’s -- their occupation, to be engaged in administrative tasks, et cetera, at a very high level. But then, when you get behind the job description, what you find is that the only thing that that person is doing is perhaps scheduling meetings. And that would not be somebody, if that person was engaged in those activities more than 50 percent of the time, that
individual would not fall within the exemption.

I think one of the speakers referred to it as a fact-intensive inquiry, and it would be. And you would have to look to see how many -- or what was the nature of the person's duties and what were they engaged in. And again, if they were not engaged in these duties more than 50 percent of the time, they would not be exempt.

COMMISSIONER BROAD: Okay. Now, I had a question about scheduling. How hard would it be for you to operate under a four-10 workweek, if what you're saying is you have 8-hour days, a 40-hour workweek followed by two 10-hour days, or one with an 11-hour day? We're talking about -- if there was no exemption, you would be talking about, at the most, one hour of overtime. Is that right?

MR. POPE: Yeah. I think what the -- what our schedules, when we looked at some of the schedules that the pharmacists are working, sometimes they would work 4 hours a day, and then they would work 11 hours or 10 hours the next day. And sometimes they would work, as Duane had mentioned, 12, which, you know, again, I don't favor that, but that would happen on the weekend.

So -- but the problem that I think we have, and perhaps, as an industry, pharmacy has, is that you have a retail environment where the store is open a certain number of hours, and the pharmacists work to try to tailor their
hours within that environment. So, I can’t say that it’s impossible, but I don’t think it provides enough flexibility, is what I’m afraid of. And I think that that is going to be a problem.

COMMISSIONER BROAD: Well, given the fact that there’s sort of been an acknowledgment that there has been a problem with work hours and excessive scheduling in your industry, though not at your company, the question for us, obviously, is how to strike that balance. And it just seems to me that the existing AB 60 strikes that balance quite effectively. I mean, it allows up to 10-hour days. Conceivably, in hospitals, it may allow up to 12-hour days if the Commission agrees to keep 12-hour days in that industry, at which overtime kicks in. And it allows employers to give employees a menu of options from which to choose for scheduling purposes, which means that, you know, you can have something that’s 4 hours one day and 10 hours the next day. And it formally requires some assent by the affected employees.

And so, I’m trying to figure out how much of a -- you know, you guys are coming forward here and you’re saying, “We need all this help, we need all this help,” but it doesn’t sound like you have that big of a problem with the -- and if you don’t favor 12-hour days, then -- and you’re the boss, then, you know, you can probably, you know,
get the employees to agree to go to 10-hour days and, you
know, make it all work.

MR. POPE: Well, I just want to bring up one
point. When the regulation, the statute, says that you can
have four 10-hour days or a menu of items, again, what I’m
looking at, from a pharmacist’s standpoint, working in the
store, the company is dictating to me what I can do rather
than saying, “Hey” -- I mean, I’m saying for myself -- I
don’t want to work a 12-hour day, but these guys, they may
want to do that.

And again, we’ve never dictated their schedules.
We don’t say, “You have to work this.” They basically do it
themselves. And I think that’s where we’re losing
flexibility. They’re losing some autonomy there. And
again, I think, for those companies where you have
pharmacists and all that they’re doing is production work,
you know, just doing -- that’s fine for them. I mean, if
that works for them, that’s fine. But there are -- there
are others that work in a different environment where they
would like to have a little bit more flexibility. If they
want to work 12 hours a day, you know, I’m not going to take
that away from them, if they want to do that.

COMMISSIONER BROAD: Thank you.

COMMISSIONER CENTER: Thank you.

MR. POPE: Thank you.
COMMISSIONER CENTER: I guess we’ll have one
hearing on the pharmacy.

I’ll go a little bit out of order. We have a
request and people have to leave. I’d like to call Bill
Walsh (sic), Vincent Payne, and John Perez.

We’ll get the other side, maybe, on the pharmacy
issue.

MR. WEBSTER: Good morning. My name is Bill
Webster, and I work at Vons Pharmacy in San Diego, and I’ve
been a pharmacist for 36 years.

I’d like to comment on some of the things that
have been laid out by the previous pharmacists that
testified. The things that they say that we do as
pharmacists, the tasks that they talked about, are what make
us professionals, not administrators. And until the passage
of SB 651, pharmacists were working longer and longer hours,
with no breaks, no meal periods, and no overtime pay. 12-
hour and longer shifts without breaks or meal periods were
common, sometimes for six and seven days in a row. You can
imagine how hard this is on us, to work such long hours with
no breaks, and at straight time.

And frequently, when a pharmacist would apply for
a position, they were told that the only shifts available
were 12-hour shifts. They had no choice. They didn’t do it
by choice. They had to either take the job or go somewhere
These long hours have led to increased fatigue among pharmacists, which affects our health and wellbeing, and dramatically increases the potential for making errors. Prescription errors have been on the rise, and I believe that much of this is attributable to the working conditions of pharmacists.

In addition to long hours, managed care has resulted in pharmacy managers pushing us to fill more and more prescriptions to increase the bottom line. These competitive pressures, combined with long hours we work, is bad for us and bad for our customers.

It is important that the Commission not weaken our rights to receive overtime under SB 651, and that we be entitled to breaks and meal periods. Alternative scheduling systems such as four 10-hour days may make sense in some settings, but it is important that our free choice be respected. That is what AB 60 requires, and this is all we are asking for.

I understand that the industry is asking that we be exempted as administrators. I don’t know exactly why we are administrators, since what we do is fill prescriptions and counsel patients. We are providing our service to the public, not to the employer. Please don’t let the industry take away what we have gained through SB 651 and AB 60.
Pharmacists need your protection.

When you are considering issues involving pharmacists, please remember you are also impacting an important public health issue.

That’s all.

COMMISSIONER CENTER: Questions?

(No response)

COMMISSIONER CENTER: Thank you.

MR. PAYNE: My name is Vincent Payne. I’m also a pharmacist with Pavilions/Safeway/Vons. I’m here on short notice. I’m going to try and be more open to hearing your questions. I’m also a lawyer as well, so I’d like to address -- my understanding is that we’re here to decide if we’re administrators as opposed to maybe professionals.

So far, I’ve heard nothing to substantiate that we are administrators, or at least to conclusively say that we are administrators. Certainly, the laundry list of things I’ve heard that we do, we interpret prescriptions -- of course we do. That implies that the doctor is communicating with us. Clearly, he is, and we have to interpret that and produce a product. And also, on top of that product, we’re also emphasizing patient care. So, you’re not just getting these bottles of pills; you are getting information, and you are getting help, and you are getting assistance. And our computers help us out. They tell us drug interactions as
such. They give us a wealth of information that we present
to the patient as a total healthcare package. That’s clear
to me. It doesn’t sound like anything administrative to me,
though.

Administrators form policies, they make policy
decisions. And we do no such thing. We produce the
product, and we also give the information for a total
healthcare package.

I understand that the retailers make arguments in
terms of providing flexibility. Well, when it comes to
manning the store, there are no real options. The store is
open a finite amount of time, say 80 hours a week, maybe, in
some cases, 90 hours, 100 hours a week. You have “x” number
of pharmacists. The math is clear; you have to have so many
shifts of certain periods of time in order -- that have to
be covered.

So, in order for them to achieve their
flexibility, they would either have to increase the number
of pharmacists, which would increase our flexibility in
terms of how we staff hours, or they would have to
accommodate the 10-hour day, to make the 10-hour day
rational and reasonable as an option.

I wholly agree with what I heard earlier about
bootstrap these -- this laundry list of things that
pharmacists do as -- and calling them -- characterizing them
as “administrative.” Clearly, if these things are defined within the rules promulgated by the Board of Pharmacy, it would seem to me that these things are clearly professional, the things that we do.

Things that were mentioned, things like reading prescriptions when they come in, kind of doing an interpretation of, “Is this Celebrex or is this Celexa?,” those things come about because we not only know the language, but we also -- we had chemistry. We -- there are certain things that, if I were to hand you the same prescription, you would be able to interpret certain things. You would be able to say, “Yeah, there’s the letter C, there’s the letter L, and -- you know, if I can read, then this is what it says.” But we see it differently. We see it as a big picture, and there is an interpretation that goes on. And I would suggest, clearly, clearly, that is not an administrative function. That is a professional function that comes from experience, our understanding of chemistry, our understanding of therapy, and so on.

And so, that’s clear to me.

I’ve heard the definition of “discretionary,” because we perform discretionary tasks, therefore we’re administrators. I fail to understand the connection between things that are discretionary are therefore administrative. Professions also exhibit discretion. I just don’t
understand that that is an ipso facto link, that because we do discretionary things, because we decipher, because we decide, “Hey, this looks like this might be too many tablets for this particular patient,” that therefore this is something that’s -- this is an administrative function. As a matter of fact, I would see it cutting the other way, as a cognitive function, a professional function.

I’d like to wrap up shortly by saying --

addressing the safety issue. Taking Ms. Coleman’s analysis of her roommate doing 24-hour shifts, clearly she had an impression that, at the end of that shift, this person is going to be compromised in some kind of way, tired, fatigued. That only makes sense. That only makes sense, if you work long hours, that you’re going to be tired and fatigued.

What’s the difference? When I hear other people say, “I work 12 hours too, I work 14 hours too,” my response is reflexive: “You get a break. You get to go to lunch.” Imagine that. Imagine where -- we do -- the law allows us to have a break, but it is not functional as it is now. I don’t take breaks. I’m permitted to, but it requires me to close down the store. I can’t do that. I can’t do that and try to not only accomplish what my company wants me to accomplish, which is to provide professional service, but I also want to be there, in the instance of having the doors
open. So, safety is a true issue.

And I would like to just field questions at this point, if there are any.

COMMISSIONER CENTER: I’ve got one. Is it required to have a licensed pharmacists be there at all times when the store is open?

MR. PAYNE: Yeah, absolutely. Absolutely. And that inhibits you from going away. It obviously puts a restriction on what is a break, and on how a break can be taken.

MR. PEREZ: Mr. Chairman, commissioners, I’m John Perez. I’m the executive director of the United Food and Commercial Workers States Council. We represent some 190,000 workers in groceries and related industries in the State of California. Thousands of them are employed by pharmacies throughout the State of California, and roughly 1,200 of them are actually licensed, practicing pharmacists in the State of California.

The two gentlemen who just spoke before me talked about the practice of pharmacies leading up to the passage of SB 651. In fact, what has been the regular practice in retail pharmacy settings is that pharmacists have been expected to work longer and longer shifts with no breaks whatsoever. And as the chairman made reference to, it has been a requirement that a pharmacist be within the four
walls of the pharmacy at all times that the pharmacy is open. That’s one of the things that distinguishes pharmacists from doctors, for example, when they work a long shift. A doctor may leave whatever office, whatever examination room they’re working in, go down to the cafeteria, leave the building altogether, and enjoy some sort of time off, before they go back and care for patients. Pharmacists, in fact, have not been able to take breaks, have not been able to take meal periods, and have not even been able to legally go to the restrooms if the restroom is located outside the four walls of the pharmacy. This has been a problem for many years.

In this last legislative cycle, we proposed SB 651. SB 651 said that no longer would pharmacists be exempt from daily overtime protection purely on the basis of their professional status. And the reason that we picked on their professional status is because that had always been the argument, that pharmacists were exempt because they were professionals. We wanted to make sure that this legislation was one that made sense for working pharmacists, was one that made sense for the general public, and was one that made sense for employers in the pharmacy industry. And as a result of that, we negotiated the terms of SB 651 with employers, with professional organizations, and with other unions representing pharmacists as we do. And that result
of that negotiation was SB 651, which said that the only way
-- in essence, the legislative intent was that the only way
that pharmacists would be exempt from daily overtime is if
they met the -- if they individually met the tests. What
we’re seeing now is the California retailers coming forward
and saying, “Well, all those years that we said pharmacists
were exempt because they were professionals, well, maybe we
were wrong; it’s not that they were professionals, it’s that
they were administrators.” I think that’s the most
disingenuous argument that could possibly be made.

We wanted to make sure that employers were taken
care of in this legislation. That’s why, with them, we
sought clean-up legislation which empowered the State Board
of Pharmacy to create regulations that allow for pharmacies
to continue to operate for short periods of time while
pharmacists enjoy a lunch period or a break. That break is
only allowable after the Industrial Welfare Commission
mandates it.

What we’re seeing now is employers reneging on a
deal that they made through the legislative process, and
saying that they now want a new way to exempt our members
and all pharmacists from daily overtime protection.

I mentioned that in addition to the 1,200
pharmacists we represent, we also represent some 190,000
other workers in retail industries. And the reason I
mention that is because all of those members stand with our
pharmacists in saying that they will not support any efforts
to undo what the Legislature did through the passage of AB
60 and SB 651.

We’re here today asking you to defend the rights
of our pharmacists to enjoy safe working conditions and
protect the public from this practice that’s been going on
far too long.

And with that, I’ll take any questions that any of
you have.

COMMISSIONER DOMBROWSKI: John, just a point of
clarification. I think the retailers are responding to the
scheduling changes that they’re hearing. They’re not trying
to renege on a deal. Hold onto the bombers. We’re looking
at just seeing, “Is there a public purpose to get some
flexibility beyond what’s in AB 60?” The answer hasn’t been
given yet, but that’s what we’re looking at.

MR. PEREZ: May I respond? As I said, we
represent 190,000 people in the retail industries. And the
reason that that’s significant is we’ve been able, for all
the course of time that we’ve represented these workers, to
figure out a way to protect the integrity of their work
shifts in a way that makes sense for employers. It seems to
me that if we’ve been able to find scheduling systems that
work for everybody else in the retail industry, we’ll also
be able to find scheduling situations that work out for pharmacists.

The idea that having no protection whatsoever gives employee protection, which is what was stated -- employee flexibility -- is absurd. A statement was made earlier today that not having any cap on the number of hours worked would allow for greater flexibility for working mothers. In fact, it’s having a cap and having the flexibility to go to a four-10 schedule, if that’s the schedule that’s mutually agreeable, that creates flexibility. Not having any cap whatsoever, and making it the sole discretion of the employer in real practice, is no protection, is no flexibility for anybody but the employer.

COMMISSIONER CENTER: Thank you.

Bob Roberts, please.

Sorry.

MR. ROBERTS: Mr. Chairman, members of the Commission, my name is Bob Roberts. I am the executive director of the California Ski Industry Association.

Insofar as our industry was one of the exempted industries until July 1st under the legislation of AB 60, and insofar as you have quite a line-up of people who I believe need remedy prior to January 1, we are very willing to defer our presentation until after January, if that would be the will of the Commission.
COMMISSIONER CENTER: Yeah. I would think we’d be better served, because I think we’re going to conduct some hearings on the ski industry.

MR. ROBERTS: I would expect you would. So, we simply wanted to register our presence here today. We hope you’re all praying for snow, because we need it, and that -- we look forward to working with you, because we do have one of the more unique industries, up above 6,000 feet in the winter.

Thank you very much.

COMMISSIONER CENTER: We’re looking forward to on-site hearings too.

(Laughter)

MR. WEBSTER: I’m sure you are!

COMMISSIONER CENTER: Marla Herrera, please.

MS. HERRERA: Hi. I just want to let you know that I am a registered respiratory therapist. I think I would fall under the professional. The licensure that I have to maintain for the State of California, I am required continuing education units to keep that license to be able to practice. I work at John Muir Medical Center in Walnut Creek. We are a trauma center for all of Contra Costa County and a partial of Solano County. We have a helipad on site, and we are directly involved in the care of the patient that comes in, to maintain their airway.
I am here to try, on all of our behalf, to have the 12-hours maintained in our industry. And there’s a lot of reasons that I have, that I’ve really given a lot of thought of.

The law, I understand, has actually been put into effect to right some wrongs that have occurred. However, I don’t think the healthcare industry falls under the mainstream of America. I understand that the police and the fire departments have been exempt, and I think we work hand in hand with them. When they’re on an accident scene, when their job ends, that’s when I go to work.

I think there’s also two other shifts that need to be considered when you’re taking away a 12-hour shift, and that is a swing shift, which is from three in the afternoon until eleven at night, and the night shift, which is from 10:30 at night to seven in the morning.

PM shift is not a great shift. It’s not a suitable shift for anybody that has any type of quality marriage or children. You’re gone before they get home, and you’re home after they’re in bed.

Night shift is probably the worst shift because it’s just not in your body’s nature to be up and functioning in those hours. Nobody likes night shift -- there’s a small percentage. But for the most part, the people that are on night shift is because of childcare issues and because
they’re low man on the totem pole for seniority. And that’s usually, when you’re a new grad, where you start.

Single parents that work night shift, 12 hours, only have to deal with a daycare issue three nights a week. And a lot of people work weekends, Friday, Saturday, Sunday, so there’s available daycare as far as family or being able to hire somebody to come in. If you push these people back to 8-hour shifts, because 10 hours does not work in the 24-hour setting in the hospitals, you have huge childcare issues. You have to hire somebody to come in and take care of your kid five nights a week to work a 40-hour week. That’s extra money out of these people’s pockets. And to find somebody that’s willing to come in is almost impossible.

Night shift people are normally sleep-deprived to begin with. That goes without saying. So, instead of working three nights a week and I’m home four days out of the week with my kids, I will be forced to be gone five nights a week. That’s a huge, huge change. Night shift people tend -- even though they’re sleep-deprived, they are more involved with school functions, they’re able to do field trips, they’re able to, you know, participate in a child’s life.

I worked, for seven years, night shift. And it doesn’t matter whether you work 8 hours or 12 hours; you
still only get 5 hours of sleep. You’re just doing it every
day, day in, day out.

The quality of people that we are able to attract
at John Muir is high. And the reason is we have 12-hour
shifts. My particular department, respiratory, the whole
department is 12-hour shifts. We are able to -- able to
have people commute in to John Muir from all over the Bay
Area. We have therapists from UC Davis, we have people that
come in from -- up from Sacramento. They come in, they do
their three days, and they go home. The flexibility of a
12-hour shift in a hospital setting is huge. It has a huge
impact on the patient care, the quality of care that you’re
able to give, and also your home life and the quality that
you’re able to give at home.

Yes, 12 hours seems horrendous, but most of us
work and eight-to-five job and then go home and put in
another four hours anyway. We just don’t get paid for it.
In my case, my 12 hours, I go home, I’m able to read the
paper, visit with my children, and then I’ll go to bed.
There isn’t any extracurricular activities those three days,
but I’m home for them.

At John Muir, we have flexible scheduling.
Because I don’t have to work three days in a row, I can
split those up any days that I want or any combination that
I want, to allow me to participate in my kids’ life.
We have issues with commuting. You take away the 12-hour shifts, now you have more people on the road commuting more miles round-trip by themselves. And that impact, I think, would affect our staff; we would lose people. Just from Fairfield to Walnut Creek is an 86-mile round-trip daily trip. You’re asking people to do that five days a week versus three. The cost out-of-pocket goes up, not including childcare. If you’re one of the lucky ones to work day shift, you’re home by 3:30. Most of us aren’t that lucky.

And the biggest reason to keep 12-hour shifts is the burnout factor. It’s huge in our industry. Healthcare has changed and placed so many more demands on us every year, and we’re required to do more. I just do not help people breathe; I also work in the neonatal unit, I do EKG’s, I do all the phlebotomy in the neuro intensive care. Every year, we are asked to do more and more. And for me to have to come in five days a week and deal with death and dying on a daily basis, and to deal with the families and to counsel them, it’s a little bit more than one person can handle. Your sick calls go up with 8-hour shifts, and your burnout rate is high, and your staff level -- your turnover is very high.

I think I was one of the last employees to be hired at John Muir. I’ve been there nine years. And the
reason is, I have the flexibility to be able to do my best the 12 hours I’m there and to give everything I have, and then be home for four days, to pursue extra educational opportunities, to rejuvenate, to be able to rest and not be so sleep-deprived.

Healthcare is a demanding, demanding business. Flexibility and patient quality of care is what it’s all about. I think that we’re going to lose a lot of people if we have to go back to 8 hours. I also know that people are already trying to figure out how they can work less hours. They don’t want to be there five days a week. How are they going to get by with less income and try and only work three or four days a week?

The mental aspect of our business is very, very tough, when you’re dealing with death every single day. And along that line, you’re dealing with counseling and helping family members make a decision whether somebody should die or not. And I think by taking away our flexibility with 12-hours, we’re going to create a bigger shortage in the healthcare industry. People are leaving already, as it is, for various different reasons, but one of them is burnout.

Quality care, that’s the big thing we hear, quality care, quality care. I give better care to my patients on my eleventh hour of night shift because I only do it three days a week, versus my fifth day of night shift
that I’ve been there, because it becomes a job. You’re there because you have to be there, and it gets tough, because then you just want to get through your shift and make it through the night, not, “How am I going to make this person better?”

So, any questions?

MR. BARON: I had a question in terms of process. Was your scheduling instituted through a secret ballot vote or a two-thirds vote? Or how did that work?

MS. HERRERA: It was -- it was instituted by a vote. They used to be -- before my time, they had 8-hour shifts. And they took, in my time, a vote. And everybody voted for 12-hour shifts. And we’ve been on 12-hour shifts -- I’ve been there eight years, and they were already implemented when I started. And one of the reasons I went there was because, wow, three nights a week, four nights home.

COMMISSIONER BROAD: Do the other employees, other than the respiratory care therapists in your department, like clerical employees and so forth, do they work 12-hour shifts too?

MS. HERRERA: No.

COMMISSIONER BROAD: So, they’re on regular, 8-hour schedules.

MS. HERRERA: Right.
COMMISSIONER BROAD: Okay. So -- and in the hospital generally, who’s on 12-hour shifts?

MS. HERRERA: Anybody clerical, that I’m aware of personally, is usually on the 8-hour shifts. But it’s mostly -- what I have seen in nursing, there’s a combination, almost in every department, of 8-hours and 12-hours, so that there is an -- there is an option. It is by choice. Our department just happens to be all 12 because we all like it. We all like our flexibility and all, and being home.

COMMISSIONER BROAD: So, does it appear to you that the people that are on 12-hour shifts are doing direct patient care?

MS. HERRERA: Yes.

COMMISSIONER BROAD: You know, hands-on patient care.

MS. HERRERA: Yes.

COMMISSIONER BROAD: Okay. So --

MS. HERRERA: Yes.

COMMISSIONER BROAD: -- it’s not like the -- you know, the janitorial staff or any of those people, you’re aware, are -- okay.

MS. HERRERA: No. And I know for a fact housekeeping is not, the clerical is not. I don’t even -- I think there’s an option in the X-ray Department of either 8
or 12’s.

You know, it allows me also to pick up more overtime. I’m not losing money. If I only work three days a week and they call me and say, “Hey, you know, he’s broke out here and we another therapist; can you come in and cover?” Sure, I’ll come in an extra day. It’s my option. But I still have three more days off. It’s also my option to -- I am not committed to working a 12-hour shift when I say I’ll work overtime. I’m able to say, “Well, I can come in and work 8 hours. That’s all I can give you today.” I’ve even came in a worked 4 hours. “Hey, I’ll come in and cover the first shift, but, you know, I’ve already made plans for the afternoon.” That is the flexibility.

My schedule is 36 hours a week. That is considered full-time. I work three days a week. I have worked 8-hour night shift, I have worked 12-hour night shift, and now I am on 12-hour days. And I -- whether a day shift or night shift, I personally could not work full-time and do 8-hour shifts. I have two teenagers at home.

COMMISSIONER BROAD: Have you ever -- this is sort of a two-part question. Have you ever worked a four-10 workweek, and how would you feel about that?

MS. HERRERA: I have not worked a four-10 workweek. I don’t think it would work very well when you need 24-hour coverage, because you’re 4 hours short every
day, which means you have double the amount of people in there to cover a shift for a 4-hour period, or you work something out for 4 hours, which I couldn’t even imagine. I wouldn’t come in for 4 hours.

COMMISSIONER BROAD: Well, how do they work this deal where they have some people working 8-hour shifts and some people working 12-hour shifts?

MS. HERRERA: It’s a buddy system. If you have a 12-hour person on days, you have a 12-hour person coming in at night. If you have the 8-hour person on days, you have an 8-hour person coming in on PM. Some people choose to work PM’s. It works with their lifestyle. Some people choose to work nights. Most of us choose to work nights because of childcare — your husband’s home, you go to work, you come home, they go to school, you sleep when they’re at school. But it’s a buddy system, so everybody’s matched up.

COMMISSIONER CENTER: Thank you.

Before the next speaker, just some housekeeping measures, just because I have another page of people that want to talk. I think we’ll take a 30-minute break at one o’clock because we’ll lose one of our commissioners and so we can get through this at some reasonable hour today, if that’s okay with the rest of the commissioners.

Sal Nicolosi.

MR. NICOLOSI: First, I want to make a brief
statement. Here’s a copy for you.

Good morning, Mr. Chairman and members of the Commission. Thank you for the opportunity to speak today. My name is Sal Nicolosi. I’m a chemical plant lead operator for Dow Chemical Company. I work rotating shifts, where we don’t have the option to stay on days, nights, or swings, but it’s a continuing rotation.

I’m here today on behalf of myself and many of my co-workers to request your consideration to continue to allow 12-hour shifts as an alternative work schedule. My fellow employees and I have been working 12-hour shifts since the early ‘90’s. We requested and fully supported these shifts.

Working 12-hour shifts allows us more personal time for ourselves and with our families. When my co-workers and I have requested to work 12 hours, we wanted to keep it cost-neutral for the company, which would allow it to be a win-win situation for both us and the employer. As members of a power team at Dow Chemical, we completely understand what it means to control costs. In recent years, we’ve seen our site go from approximately 900 employees to 400 employees, due in part to our historical inability to compete from a cost perspective.

I sincerely hope that you would allow and trust me and my fellow co-workers to vote for 12-hour shifts as an
alternative schedule if that’s what we think is best for us personally. The ability to consider 12-hour shifts should be available to all employees in California. The ability to work 12-hour shifts over the past eight years has provided me with additional personal time and family time, which has been invaluable and which I do not wish to sacrifice in the future.

Thanks again for the opportunity to speak. Any questions?

COMMISSIONER McCARTHY: Well, I want to thank you for taking the time to come here. Obviously, this is a matter of concern to you and to your family and fellow workers. But I do, in fairness to you and to others who may express similar sentiments, I must point out that our job -- perhaps there’s a misunderstanding of what we are empowered to do here. Our job is not to repeal the act of the Legislature. And while there are places where we can make exemptions, that’s true, by and large the decision with regard to these matters has been settled by the Legislature. And so, it may be -- very well may be the case -- essentially, what you’re asking us to do is to overturn the law of the Legislature, which is not in our lawful capacity.

MR. NICOLOSI: I understand that. What I did want to do today is go on the record with my opinion, not necessarily ask you to change something outside your realm
of power, but just be heard as a public worker.

COMMISSIONER McCARTHY: Well, I appreciate you
taking the time to come here and do so. Thank you.

MR. NICOLOSI: Thank you.

COMMISSIONER CENTER: Steve Friday, please.

MR. FRIDAY: Thank you. I think I can keep this
even shorter because Sal and I came together.

I’m Steve Friday. I’m a human resources manager
for Dow Chemical here on the West Coast.

And I think I’ll just cut mine down a whole lot
here, and just say that we are still hopeful, perhaps, that
as this process goes forward -- and Mr. McCarthy, as you
indicated, the law sets this out -- I think some of the
interpretations we have seen may have indicated that there
might have been an omission or that some of these were left
out.

Our employees do very much like 12-hour shifts.

It’s a four-on, four-off, so four days of 12’s, two nights
-- two days. They don’t have to worry about who’s got
seniority; it does rotate. Then they have four days off
with their family.

Our employees are very much -- in today’s
environment, we’ve gone down from eight or nine levels in
our company down to four. So, Sal only has two people to
look through before he’s looking at a CEO of the company.
We have nice programs. We have nice variable pay rewards. We’re looking at a great on this year, on top of our salaries, where -- Sal makes probably $27 to $28 an hour. Our operators are highly paid, with an average of $25 an hour. But we’ve also learned to be very much cost-conscious. In other words, they play an active role in setting the budgets now in their plants.

I think the thing that they’ve seen -- when Sal mentioned that we’ve gone from 900 down to 400 employees -- is that we’ve lost our ability to compete with other Dow locations in the U.S. What happens is, we may have a plant generating the same product elsewhere in the country. If they can make it for a few cents a pound less, whether they’re a union shop or not, when the decisions are made where to build a new plant or whether we’re going to shut down a plant, it’s based on those tenths of cents per pound.

And so, the operators like Sal have taken a real pride in the company and in their roles of being able to compete. But granted, we’ve gone from 900 to 400, and we did just close down an epoxy plant for that very reason, because another location in Dallas that could make the same product cheaper and we could get it shipped out.

So, what we’re looking at preserving, really, with some of these opportunities is a chance to keep our payroll here. Even with 400 employees at our Pittsburg site -- now,
we have sites in Pittsburg, Torrance, Long Beach, and San Diego -- but just with the 400 employees at our Pittsburg site, we’re generating $20 million per year payroll into that area, $15 million a year into that Pittsburg area for contractors and services that we purchase. We pay $18 million in income taxes as well -- to the State of California annually, plus $4 million on local property taxes.

Sal also participates in a program that generates $100,000, just into the local schools and charitable organizations, that we donate each year.

What he looks at -- and we’ve all learned to realize -- is we’re not the federal government in our company. And if we can’t be competitive, if we can’t get those costs reasonable -- and we’re not asking our employees to do anything unsafe -- by the way, our safety record is the best it’s been in a decade. We are committed to zero OSHA recordables, and we’re at our lowest level, which right now is 1.1 incidents. That’s 1.1 injuries, which may even be a scratch, per 100,000 hours in the chemical industry.

We have a lot of training, a lot of very qualified and capable and intelligent people. And they love the four 12’s, and they’re willing to understand what it means to watch the line on costs in order to continue that job and to have that opportunity in the future.
So, that’s our request. If there is a chance or an opportunity, as all of you move forward, to consider whether or not 12-hour shifts could be considered as an alternative schedule, we would -- it is important, and it’s not just a way to skip a buck or cheat somebody out of a penny. It’s quite the opposite of that. It’s a matter of maintaining the roles we have here in California and keeping our plants here so we can compete with those states that don’t have to deal with these issues. And we are very competitive amongst ourselves, much less with our competitors outside of the company. But we tend to compete very well within our own company.

With that, I appreciate it, or any questions, I’d be happy to address.

COMMISSIONER CENTER: Thank you.

MR. FRIDAY: Thank you.

COMMISSIONER CENTER: Vicki Zahn.

MS. ZAHN: Hi. Good morning. I’m a registered nurse at Queen of the Valley Hospital, which is in Napa, California. And I work in the intensive care unit.

When I first started at the hospital about eight years ago, I was hired onto 8-hour shifts. But when I took the job, it was with the promise that we would soon be having a vote and possibly going to 12-hour shifts, which we did. I was, at that point, on a telemetry floor, which is
cardiac monitoring. And as I recall, we had to vote it in by a greater than two-thirds majority. And it voted in overwhelmingly, by about 90 percent of the staff. The few nurses that did not want to work 12-hour shifts, for a while we had a combination 8-hour shift, 12-hour shift floor. And eventually, that was a nightmare in scheduling. And most of those nurses either decided to try the 12-hour shifts, which they either liked, or they decided to go elsewhere in the hospital, because within the hospital there’s a combination of 8-hour and 12-hour shifts.

So, I just want to make a couple of points about the advantages that we see -- I’m representing myself and also all my co-workers who work 12-hour shifts and uniformly love the 12-hour shifts.

From the patient and family viewpoint, we’ve always, as a profession, wanted to provide continuity of care for our patients. And with shorter hospital stays, 12-hour shifts actually provide much better continuity of care than an 8-hour shift. In 12 hours, we have time to really get to know our patients, really get to know our families. They’re in a crisis situation, very ill, and we have time -- we feel we have time to really deal with the psycho-social issues as well as the patient care issues.

In 12 hours, you really get to know your patient on a physiological level. We’re dealing with very
critically ill patients who are very sensitive to the
treatments that we’re giving. In 12 hours, we know our
patients much more -- we can much more succinctly give the
right amount of medications and note their response, from a
physiological level. And I feel that we -- feel like we may
impact the quality of the care of our patients much more on
12-hour shifts than on an 8-hour shifts.

We have many tasks that we do within our day that
have to be done once per shift. In the 8-hour shift, you’re
struggling to get your morning stuff done, starting to catch
up in the middle, and then struggling to get afternoon stuff
done, and then you’re going home. In a 12-hour shift,
you’re doing certain tasks, you’re doing the same once a
shift, but you have several more hours to spend quality time
with patients and with your families. They have time to
really develop a trust level with you, really open up with
you in a way that does not happen nearly as readily on an 8-
hour shift.

From the point of view of the night shift, if
there -- when there’s three shifts a day, we have to cover
24 hours, so 10-hour shifts are not really feasible in our
environment. On an 8-hour shift rotation, you have to wake
the patient up after 11:30 at night and do a complete body
assessment, interrupt their sleep cycles, and then you try
to get them to sleep, and then do a few tests in the
morning, and then the night shift is going home. So, that shift really never gets to know their patients and really doesn’t have a high level of job satisfaction.

As for mistakes, I haven’t personally seen any mistakes made because of the exhaustion level of the nurses. I’ve seen lots of mistakes made in the changes of shifts. When you’re changing shifts three times a day, there’s a lot more potential for the kinds of mistakes that happen because of miscommunication or because of missed communications. Personally, I think that there’s far fewer mistakes in a 12-hour shift rotation than in an 8-hour shift rotation.

I would like to emphasize the importance of maintaining flexibility in a healthcare environment. It’s very stressful. It’s very hard to attract employees. Having the flexibility for a 12-hour or an 8-hour workday, which we have in our hospital, attracts many people. And the same as the respiratory therapist pointed out, we, with 12-hour shifts, are more likely to attract professionals who have to commute to work and only have to commute three times a week rather than five times a week.

We give a lot of ourselves in a our job. It’s a highly stressful job. We can do it because we have enough time off to completely rejuvenate ourselves. Whether it be family, whether it be other activities that we’re involved in, most of the nurses that I know feel that they have a
very rich life. And part of it involves their time at work and part of it involves their time out of work.

We also have more time to enrich our career on a 12-hour shift. We have time for educational opportunities. Many nurses have a second position where they do some teaching. They may be involved in community work, they may be involved in the schools, somehow involved in the community outside the day-to-day, on-the-floor hospital care. So, I think that most nurses feel that professionally, we have a much more rich career when we have the 12-hour shifts and we have time in our lives to do other things than work actually on the floor.

It enables us to be involved in more projects in the hospital. We can be involved in committees. The work that I do, we don’t have time to go to a meeting in the middle of our workday. If we want to be involved in committees and developing policies, in any project for the hospital, then most of us do that on our days off. And we like doing it, it makes us feel more involved in the hospital, but it’s not feasible in the environment where I work, to be able to go to a meeting at twelve o’clock one day, or whatever, because you don’t know what would be going on at that time.

And another point is that many nurses -- it’s a good-paying position; it’s not a fantastic-paying positions.
Many nurses, in order to support a family, carry a second job. And they have time to do that on a 12-hour shift, whereas they wouldn’t maybe pick up one day a week somewhere else, whereas they wouldn’t.

And also, with the staffing, our census is so variable that when staffing is tight and if we are short of nurses, we can call around. I think we’re much more likely to find a nurse who has some time on a day off on a 12-hour shift schedule than on an 8-hour shift schedule where you’re working five days a week.

So, I think the real bottom line for me, personally, is that we would you try to take an industry where we give so much, work so hard, and have a shortage of nurses and other healthcare professionals, and take away some of the flexibility, when we have freely voted it in and love it? It’s a wonderful schedule.

So, that’s all I have to say. If you have questions --

COMMISSIONER CENTER: Thank you.

MS. ZAHN: Thank you.

COMMISSIONER CENTER: Connie Delgado Alvarez.

MS. ALVAREZ: Good morning -- oh, afternoon --
sorry.

I just really have a very quick technical clarification. Last week when I made a presentation, I was
-- I’m with the California Healthcare Association -- I was asking for the IWC to look to restoring Wage Orders 4 and 5. And I mentioned 4- and 5-86. And it’s 4- and 5-89, amended in ’93.

So, if there was any confusion on my part, I’m sorry for that -- probably a lack of oxygen, with two people breathing here. So, just if there was any confusion, I hoped to clear that up. Thank you very much.

COMMISSIONER CENTER: Thank you.

COMMISSIONER BROAD: Can I ask a quick question?

COMMISSIONER CENTER: Yeah, go ahead.

COMMISSIONER BROAD: I was wondering if you would address the question I asked the other witness earlier about whether non-patient-care employees are on 12-hour shifts in hospitals.

MS. ALVAREZ: To the best of my knowledge, the answer that she had given was what we -- we assume that most of the hospitals are, the nursing and therapists, and not really clerical or janitorial staff. That may depend on independent, you know, contracts with union organizations that may be on alternative shifts like that, but for the most part, I believe it’s just limited to the personnel that she had mentioned, the nursing and the therapists.

COMMISSIONER BROAD: Thank you.

COMMISSIONER CENTER: Juli Broyles.
MS. BROYLES: I’ll wait until the December 15th hearing.

COMMISSIONER CENTER: Thank you.

Judith Levin.

MS. LEVIN: Good afternoon. I just have a simple question to start, and maybe no comment afterwards.

I know that the hearing is about merely Wage Orders 1, 4, 5, 7, and 9, and I’m wondering if the exemption that existed under 15-86 for personal attendants would be affected by this bill.

COMMISSIONER CENTER: The answer is yes. And we’ll give you direction in our next hearing.

I think the bill affects all overtime for all workers, unless you have specific exemptions, and it named the industries that were affected.

MS. LEVIN: When you say “in the next hearing,” do you expect things --

COMMISSIONER CENTER: What we’re attempting to do is, our December 15th hearing, have proposed regulations to the industry to labor to make comment to us, and adopt these regulations in January.

MS. LEVIN: So, would it be appropriate to give testimony about 15-86, the exemption for that, at this time?

COMMISSIONER CENTER: Yes.

MS. LEVIN: Okay.
My name is Judy Levin, and I’m the associate agency director at Family Support Services of the Bay Area, which is a private nonprofit social service agency. We provide respite services, which are breaks for families who have kids with special needs, a chance to get away. I’m also the vice president of Respite Services Association, which is a statewide group of nonprofit agency which likewise provide respite services to about 3,000 families of children with special needs, developmental disabilities.

So, respite workers go into the homes of families to give them a break away from their care. They act as surrogate parents during that time, doing whatever the parent might do. Currently, our respite workers are exempt under Wage Order 15-86, and I’m here to strongly advocate for continuation of that exemption, in the best interest of the families.

Why is this exemption so critical? There are really two reasons. First is a very practical level. The way that we are reimbursed from the State Department of Developmental Disabilities is on a fee-for-service basis, an hourly wage based on a base salary for the respite provider, and then a small administrative cost for the respite agencies.

If overtime were required, there is no effort at the state to pass on any payment to respite agencies for
those additional overtime payments, so we would then be in a position of truly of being a nonprofit agency. We would go out of business, basically, is the problem, or we would have a choice, which would be to tell families, “You can’t use respite for more than 8 hours.” Why is that a problem? Any of you who are parents, I think, can understand sometimes you need to get away, and you need to get away for more than 8 hours. And certainly, respite providers do short-term things, like allow parents to go to their own doctors appointments or run errands or do simple things, but families also want longer periods of time, where they can go away overnight or for a weekend. So many of us, as parents of typical children, enjoy that opportunity. That would not be possible.

I think you can understand that families are reluctant to turn the care of their child with special needs over to anyone, and when they do so, reluctantly, they want to have face-to-face contact with that person, explaining what the care needs of their children are for the time they’ll be there. If we have to put in shifts of people, that parent would not have an opportunity to connect with the second or the third or the fourth employee coming into the home. And I don’t think that provides good care for children.

It’s also very disruptive to children with
developmental disabilities to have multiple caregivers. Children who are autistic do not do well with change, and having shift-like coverage could actually escalate children’s behaviors and cause them to have a lot more behavior problems than they currently do.

I also want to address it from the point of view of the respite provider. Families are usually given a set number of hours per month, and the family can use that in any way they want; it’s up to them. Respite providers might only work with one family. And if that family gets, let’s say, 42 hours of respite every quarter, and the family wants to go to Reno, that’s how they want to use it. And that respite provider, they could only do 8 hours. And that may be the only person they trust with their child. So, I guess I would wonder why we’re limiting families in that way.

These respite providers are on-call, hourly employees. They can choose to accept or not accept any position that they would like. Most of our respite providers do something else in their lives; they’re students, they’re part-time workers, they’re homemakers, they’re doing this maybe as community service, or just as a part-time job. It works for them because they can get in a large number of hours, perhaps in a weekend, and then they may not work for the rest of the quarter with that family, or they may not work the rest of the month. So, they do
their respite and then they’re off usually for, you know, quite a long period of time with that family.

If overtime is instituted, those respite providers will be financially limited because we won’t be able to allow them to work more than 8 hours because we won’t be reimbursed from the state for that.

So, I urge you maintain the overtime exemption that currently exists under 15-86. Families of children with special needs have service needs that exceed 8 hours. It’s not well served by multiple persons. Children with special needs do not benefit from shift-like coverage of their childcare needs. And respite providers prefer the flexibility that respite work does as their schedule permits.

If overtime cannot truly be maintained under 15-86, then there must be some provision that mandates reimbursement for these kinds of hours for providers.

So, thank you in advance for your thoughtful consideration.

COMMISSIONER BROAD: Well, it appears that what happened with the exemption that was in 15-86 is that when the last Industrial Welfare Commission eliminated daily overtime in general, it -- as I understand it, it eliminated the exemption that you are talking about. And so -- and the old wage orders are only reinstated for certain ones. Order
15 doesn’t change; it’s not affected.

And so, what you have is a situation, as I understand it -- and I may be wrong -- it’s from reading the submission from people in your industry -- is that there’s one set of rules that affects personal attendants who are employed by a business entity, or a nonprofit or a --

MS. LEVIN: Right.

COMMISSIONER BROAD: -- facility, and another set of rules for personal attendants employed in the home. Is that right?

MS. LEVIN: Outside of a nonprofit agency, do you mean, then?

MR. BARON: No. I think the key is where do the workers work. If you’re working in a facility, in a hospital, you’d be under Wage Order 5. If you’re working in a home, you’re under the wage order that you referred to. And the issue of -- there were different -- in the older Wage Order 5, for personal attendants in a facility, as you go back and you look at -- refer to Section 21, there is a 54-hour exemption for those personal attendants. In terms of -- I don’t -- in terms of the newer -- in terms of Order 15, for instance -- that’s why I was just -- it doesn’t make reference to a 54-hour week.

MS. LEVIN: Right.

MR. BARON: It makes reference to either 8 or 40.
And I heard just -- I just want to be clear on what the shifts, how many hours a week the workers, your workers, work.

MS. LEVIN: I guess I was -- I looked at 15-86 and saw that there was an exemption for personal attendants, that there was no work limitations. So, our shifts vary based on family needs.

MR. BARON: So, do you have any -- over the general sense of -- would you say they vary from 20 hours a week to --

MS. LEVIN: It could be anywhere from 3 hours to 50.

COMMISSIONER CENTER: Now, if you were reimbursed by the Department of Developmental Services for the overtime, would you support overtime for the workers then?

MS. LEVIN: It would be great for the providers to have more money, sure. They’re one of the most underpaid groups. I’m sure that would be helpful.

COMMISSIONER CENTER: Thank you.

Juli Broyles, yeah.

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

I did have a just a process question. You have mentioned a couple times that draft wage orders will be -- and regulations will be available for comment at the
hearing, or prior to the hearing with a chance to review
them so we can provide accurate comments on those?

COMMISSIONER CENTER: We hope to have them by
December 15th. Then you’ll have a month to comment if
there’s -- well, for a 30-day notice.

MS. BROYLES: Okay.

COMMISSIONER CENTER: Then you can supply comment.

MR. BARON: We would like to issue them in
January.

MS. BROYLES: Okay. And then these would be the
wage orders that you would then be voting on in --

MR. BARON: January.

COMMISSIONER CENTER: January 15th.

MS. BROYLES: Okay.

Bill Webster. He already testified.

John Dunlap.

MR. DUNLAP: Good afternoon, Chairman Center and
commissioners. It’s a pleasure to be with you today. I’m
John Dunlap, the president and CEO of the California
Restaurant Association. And I wanted to introduce two of
our members, Greg Wellington, to my left, who’s with Papa
Murphy’s, and Jim Nichol, who is with the Harmon Management
Group, which are the franchisees of KFC’s and Taco Bell.

I wanted to give you -- I appreciate the
opportunity to come before you today. We had -- at last
week’s hearing, Jon Ross, with the law firm who represents
us, had a chance to speak to you briefly.

We want to tell you a bit about our trade
association. We represent some 3,400 restaurants, who
actually represent some 13,000 food service businesses
statewide. The restaurant industry is the largest retail
employer in California, providing jobs for in excess of
890,000 people.

Having sat for a few years as a regulator, on the
other side of the table, I appreciate the painstaking
process you’re involved in now relative to ensuring full
public participation before your body. I think that’s
important, and we want to commend you for that. We think
that reaching out to all those that will be impacted by
issues that you have the responsibility for is responsible
and good government.

Restaurants, like other employers you’ve heard
from today, have used flex-time scheduling to help their
employees satisfy competing demands in their work and
private lives. People eat, and therefore restaurants stay
open all hours of the day. This presents unique challenges
to restaurant operators and unique opportunities for
restaurant workers.

As enacted by the Legislature, AB 60 offers both
workers and employers considerably more scheduling
flexibility than existed under California’s prior daily
time system. The Legislature left to this Commission
the task of developing rules that make this promised
flexibility a reality.

In talking to our board and members around the
state since the passage of AB 60, one theme has emerged
quite clearly: the extent to which our members continue to
make alternative schedules available to their workers will
depend, in large part, on the rules established by this
Commission to implement alternative schedules. Small
businesses will be very reluctant to adopt alternative
schedules if the procedures for establishing alternatives
are overly complicated, particularly in light of the
substantial new penalties now imposed for violations of your
work orders.

It is our strong belief that our workers have
benefited from flexible scheduling, not unlike those stories
we’ve heard from others today. We have similar we can, of
course, share with you. If these benefits are to continue,
the process for establishing alternatives must be manageable
for small businesses.

At this point, I’d like the change gears and talk
about the manager exempt provisions of AB 60. Like other
retail employers, restaurants have a unique interest in this
issue. In the restaurant industry, managers are not
stationed at desks directing the activities of subordinates.

Rather, the manager’s primary duty is to ensure that customers are served. This means working alongside employees, at times assisting and teaching the cook in the kitchen, helping guests when short-staffed, and, of course, trying to work out a schedule that meets the demands of all employees overall. What distinguishes the manager from other employees is often his or her responsibility to simultaneously perform multiple tasks, all designed to ensure that the restaurant provides first-rate service to its customers, for without the first-rate service, because there are so many choices for people in which to dine, they’ll go somewhere else. So, the customer service element is extremely important.

As enacted, AB 60 directs the Commission to conduct a review of the duties which meet the test of the exemption. In directing the Commission to review this issue, the Legislature clearly acknowledged that current notions of a manager’s duties may not reflect the reality that exists in retail businesses such as restaurants. In the coming months, we look forward to working closely with you as you consider this issue. And we want to thank you again for the opportunity to speak today.

And with, I’d be happy, Mr. Chairman, to introduce my two colleagues here.
COMMISSIONER CENTER: Thank you.

MR. DUNLAP: Greg Wellington, from Papa Murphy’s. Thank you.

COMMISSIONER CENTER: Can you give him the mike?

MR. WELLINGTON: Thank you very much. Good afternoon, Chairman Center and commissioners. My name is Greg Wellington, and I am currently an owner-operator of a take-and-bake pizza concept called Papa Murphy’s. Just opened up our second store in the Sacramento area, in Roseville. We have another store in Sacramento up Bradshaw Road.

A little bit about who I am: I’ve been in the industry since I was a young teenager, started out with Sambo’s, which was a pancake house a number of years ago, washing dishes, have grown up in the industry, have worked for Taco Bell, Pizza Hut, have grown in my stature within the industry, worked for Pepsico in a number of different capacities, and have recently branched out and become a franchisee, which is exciting, going into that line of work and being an owner-operator.

Again, the reason I’m here, in defense of what we would call our profession -- I’m a food service professional -- and how we look at our managers and the job that our managers do. Being somebody that’s risen up within the industry from humble beginnings, I know what it takes to
deliver to the customer what they expect when they come into a dining establishment: quality food, excellent service, clean environment, and of particular note in this day and age, healthy food, safe food. Given the nature of our business, we deal with the public and we want to make sure that our industry is kept wholesome and that we can provide the things to the consumer that they’ve always expected from the restaurant industry.

To do that does take a broad number of skills. Being a manager in a food service environment and juggling all the balls that it takes isn’t just something you can do from behind a desk. You need to be out in front of the public. In many cases, being a manager in a food service environment, you can’t differentiate between the manager, in some cases, unless they’re wearing a name tag or a different color shirt, but they are on the front line. They’re dealing with the consumer, they’re watching the flow of business, making sure that the food is served quickly, friendly, and making sure that the customers are happy. Food service managers are accountable for the entire business. Any service issues, any product issues, they have to be on that front line engaged in activities that are going to impact that final product they’re delivering to the customer.

Our business is all about QSC, quality, service,
cleanliness. But beyond that, to hire quality people, to train people, coaching them, the administrative part of the business is important. We can’t neglect that, keeping track of the numbers and the books and deposits, payroll, ordering, are all important in business. However, what makes the difference between a well run restaurant and a restaurant that was here today, gone tomorrow, was the ability of that manager to connect with the public and to make sure that QSC is first and foremost the priority.

I’ve always taken great pride in pleasing people. Being in a service business, to me, what it’s all about is when I hand, in my case, my take-and-bake-product, across to that consumer and they get a good value, good price, they take it home, and they love our product. That’s something I learned a long time ago at the places I worked when I was young. And I’ve worked my way up. And I take great pride in the business. I’m part of the food service industry. Working together with my staff in the front of the house, in the back of the house, the kitchen, the front lobby, to provide excellent customer service.

So, that’s kind of my spiel. Thank you.

COMMISSIONER CENTER: Thank you.

MR. DUNLAP: I’d also like to introduce Jim Nichol, who’s with Harmon Management Corporation. They have some 41 -- he represents the Bay Area Region -- they have 41
franchisees or franchise sites, including both KFC and Taco
Bell.

MR. NICHOL: First off, can you hear me? Okay.

As I’ll explain here, my name is Jim Nichol. I’m
with Harmon Management Corporation. I had a real similar
experience in my life to Greg. I grew up in the restaurant
industry. I started when I was 16 years old, cooking
chicken for KFC. Luckily, I hooked up with a good
franchise, which is Harmon Management. They gave me many,
many opportunities to grow and learn things as I aged, and
I’m still learning and growing right now. Anyway, I had a
chance to become an assistant manager, manager in the
business, and now I’m a supervisor for forty stores here in
the San Francisco Bay Area. I’m also a vice president with
our parent company.

Today I want to address your concerns and also
just to say that we are very interested in how you respond
to this legislation. There was somebody here earlier that
stood out in my mind when I was just sitting here, something
about the status and how do you determine a manager versus a
regular employee. And I looked at a manager, and I was
thinking back to when I was a store manager in the industry
and working day-to-day, every day in restaurants. And I
think it’s a 50 percent basis; you manage 50 percent and you
work 50 percent to become exempt here. And I cannot
remember one day in my life that I wasn’t managing 100 percent of the time I was in a restaurant. Now, I may have been sweeping a floor, but while I was sweeping the floor, I was probably figuring out why my cleaning schedule wasn’t working and why an employer would be doing that job. Or I may be cooking chicken sometime back there, but at the same time, I was determining how I was going to get this new employee a better job of making sure that my products were fresh and preparing them for the customers the way they should be.

So, I think that, you know, when you look at a manager in a restaurant, it isn’t, hey, this guy works half the time being a boss, and half the time he might wait on customers, or half the time cooking chicken or whatever, making pizza or whatever it is that he turns out there. You guys have got a tough job to determine here. You know, how you guys -- how do you address this, and how do you protect that are doing the job of it, and not the ones that are abusing it. I understand that. But we want to be sure that you know that we’re here to help and we want to provide you with information.

I want to -- you know, most of our managers in our businesses are set up with an incentive plan. They get paid more if they perform at a higher level. By doing that, it helps the owners of the restaurants, obviously, and it also
provides them a chance to make more money, if they want. They have the right to make their schedule the way they feel that it needs to be set. They are treated fairly, and they can run and manage a restaurant efficiently, protect the customers, keep it clean, and help it grow. And I think that’s very important.

If you eliminate, you know, the manager’s chance to go out and run a restaurant by saying now they’re an employee, and “We’re going to pay you as an employee, and you’re going to be treated like an employee,” you eliminate all chance of an incentive. People don’t have the independence they want. Now, maybe labor is about that, but that’s not what our business is about. And if we start controlling those guys and having other people tell us how to run it, we’re going to have problems.

You know, when I walk a restaurant now — I have a Kentucky Fried Chicken that’s only two blocks away from here, on Polk — I pick up the trash when I walk in. If a table needs to be wiped off, I wipe off the table. And that’s in each of our businesses. And you can’t be controlling it by other people telling us how much we can work, one aspect, how much we’re going to get paid, another aspect, how much we’ve -- and how -- let me rephrase that -- and we want to be able to make our own decisions.

Let’s see here. I think that, you know, if you
look at the way a restaurant is set up, and -- John was
telling you that we don’t have offices in our restaurants --
managers don’t spend their time in offices. Our offices are
closets with some computers. They end up having a place
where they can go in there and maybe place an order, do
their scheduling, keep the files, you know, basically that
kind of stuff. But they’re out on the floor all the time.

That’s my representation here today. If you’ve
got any questions, I’d be glad to address them.

COMMISSIONER CENTER: Thank you very much.

COMMISSIONER COLEMAN: I have a quick

question.

COMMISSIONER CENTER: Okay. Sorry.

COMMISSIONER COLEMAN: On the voting requirement
part of -- you mentioned, John, the task of this Commission
to sort of operationalize the flexibility and keep the
protections in place. Do you have any models that you can
share with the Commission of voting procedures that have
worked in your industry?

MR. DUNLAP: Sure. We’d be happy to do

that.

One of the things that I didn’t mention in my
remarks, in the interests of time, but I should, is we have
very high turnover in the restaurant industry. In some
cases, particularly in quick service, it could be as high as
150 percent. So, employee retention and involvement in the scheduling process is very important to keep, you know, your people around.

As Jim mentioned, his career is not unique. Actually, both of these gentlemen, they worked their way up, and they found what it means to keep employees happy and around. And that flexibility is very important. So, they have a very inclusive management style as company managers and representatives.

We’d be happy to share with you some of the more successful schedules.

But the restaurant industry overall has very high turnover. We’re devoting ourselves to training the workforce of today and tomorrow to stay with this industry. It’s very important. Also, the -- it’s a very competitive industry. There’s a large number of restaurants that fail. There are some statistics things about -- some of them that are mentioned, there are four out of five restaurants that are open today that won’t be around in five years. And so, we’re learning, we’re evolving, and trying to figure out how to do this better.

That’s why we have a very high level of interest before your Commission here. We’re gratified -- we had some conversation with -- both in the Legislature and the Governor’s Office -- about this body’s willingness to be
flexible and work with us. But we do not have an answer.
That’s why we’re here. We want to kind of hear about it and
work with you to get --

COMMISSIONER CENTER: Just one comment. Mr. McCarthy and I, we were on the prior Commission when we took
the vote to eliminate the 8-hour day in California. One of
the proposals was to change the definition of “primarily,”
and it was proposed by industry. That fell by a 5-0 vote in
the former Commission. And so, it was fear of abuses out
there --

MR. DUNLAP: Right.

COMMISSIONER CENTER: -- by testimony of employees
coming forward, one after another, that they were classified
managerial so they could eliminate even the minimum wage on
those. And we had a number of people testify on that, and
it was a unanimous vote not to pursue changing that
definition of “primarily.”

MR. DUNLAP: Yeah. Well, I’m relatively new to
this post. We have a new team at the Restaurant Association
-- not just a staff team, but leadership. And we’ll examine
what we said before and make sure we’re aware of the
history.

But again, we want to pledge our commitment to
work with you in this important matter.

COMMISSIONER CENTER: Thank you.
With that, we’ll take a break till 12:30 -- yeah, 1:30 -- excuse me.

(Thereupon, at 1:00 p.m., a brief lunch recess was taken.)

--o0o--
AFTERNOON SESSION
--o0o--
(Time noted: 1:43 p.m.)

COMMISSIONER CENTER: Excuse me. Could we finish the conversations and continue with the hearings, please?

I’d like to call up now Marcy Saunders, the State Labor Commissioner.

MS. SAUNDERS: Chairman Center and the rest of the IWC members, I just wanted to try to clarify one issue today at DLSE and how they’re interpreting the wage orders.

First of all, because mining, drilling, and the construction industry, as an example, were not clearly exempted from Wage Order 4, it is our position that they are covered under -- for overtime after 8 hours in a day.

However, as the Labor Commission, I have the discrimination to interpret the law for enforcement. And that’s how we are interpreting the law at this point.

We have not made -- taken a position on anything other than it’s covered. We haven’t taken a position yet, and we’re still looking at it and studying it, as far as how we are going to enforce it. However, it does appear to us that, as of January 1st, because there is no clear statement within AB 60 that exempts those different industries, that we feel that they will be covered under AB 60, no matter
what the situation is, because there is no clear exemption
for them in the bill now.

And I hope that clarifies. I know some of the
questions people have had.

COMMISSIONER CENTER: Anybody have any comments?

And what we intend, hopefully, is to give you
clear direction from the Commission come January 2.

MS. SAUNDERS: That would be very much
appreciated. Thank you.

COMMISSIONER CENTER: Thank you.

Now Maureen Wright.

MS. WRIGHT: Good afternoon. My name is Maureen
Wright. I’m from the Respite Inn. And we’re a nonprofit
agency that serves developmentally disabled adults in a
respite care facility.

And what I am here today is in regards to Wage
Order 5, under the personal attendants. And I’m talking in
regards to if it ended up going to an 8-hour -- 8-hour day.

Currently, how our shifts operate is we operate -- we have
8-hour and 16-hour shifts. And the people who work 16-hour
shifts, part of that time is sleeping, so it’s 8 hours of
sleeping and then 8 hours of providing direct care. All of
our staff are on call, so they have a preference of working
8 hours or 16 hours. And in the wintertime, we’re only open
on the weekends. In the summertime, we’re open seven days a
week.

For -- what we have found historically is it is difficult to find employees to work 8-hour shifts, 8-hour shifts or less. People who are employed by us are typically single parents, they have another job, they’re going to school, they want three or four days off so they can have time to do other activities and personal -- for their personal care.

I have talked to our employees in regards to if the 8-hour was instated for personal attendants. 70 percent of our employees said that they would have to quit. They don’t want to be working 8-hour days. It wouldn’t be beneficial for them. Why come in for 8 hours and give up a weekend, to come in for just 8 hours at a time?

And the other issue in regards to if we end up having to put on three shifts, the amount of sick -- people calling in sick would dramatically increase. And what happens is, I as an administrator, ends up having to cover the shifts myself, which ends up -- in turn, I have to end up working 80, 90 hours a week, because of that.

And also, in regards to the communication among staff, we all have heard that when you tell one person one thing, it goes to the next person, and it goes to the next person, and by the time it gets to the third person, it’s completely different. What ends up happening when we have
three shifts is the communication ends up very convoluted at
times, and can, in turn, be detrimental for the people that
we serve.

So, thank you for your time. Any questions?

COMMISSIONER CENTER: Thank you.

Just a point -- Commissioner McCarthy also wanted
to let me explain to the audience that this is being
electronically recorded, so he’ll be getting copies of this
testimony too.

Next is Lisa Tomlinson.

MS. TOMLINSON: Good afternoon. Can you hear?

Okay.

My name is Lisa Tomlinson, and I’m the vice
president of human resources for Pac Pizza. And I’ve held
that position since 1997. Before that, I was the director
of human resources for the Marriott Corporation.

Pac Pizza is the second largest franchisee of
Pizza Hut restaurants. We currently have 149 restaurants.
Pac Pizza operates 126 of those restaurants throughout
Northern California.

I understand that you have the responsibility to
review the duties that will allow employers to classify
various employees as exempt from overtime pay requirements.
I would like to share my company’s thoughts about the duties
of the managers of Pizza Hut restaurants and why Pac Pizza
believes those managers qualify for the executive exemption.

Pac Pizza’s restaurant managers are responsible for all aspects of restaurant operations. They recruit, interview, hire, discipline, and, if necessary, terminate employees. They are sure that all employees are properly trained and report to work, make pizzas to meet high quality standards, and provide good customer service. They perform periodic evaluations of employee performance, they forecast labor requirements, and schedule and deploy crew members to cover the hours the restaurants are open and the busiest times of the week. They analyze financial performance each week and make adjustments in operations to improve performance. They direct and monitor food preparation. They manage the inventory of food and supplies. They establish community relationships, such as school lunch programs or athletic team parties. They market Pizza Hut products. They manage all the cash, balance cash accounts, and make bank deposits. The restaurant managers make sure that each restaurant is safe, clean, and properly maintained.

At times, the manager will also engage in production activities, such as making pizzas or cashing out customers. Part of the time, they do this production work to train new employees. At other times, the manager performs this work because there’s a rush or because there
are simply not enough crew members available to do all the work without the manager’s help. Even when the manager is helping with production work, though, the manager remains responsible for supervising all of the employees in the restaurant and monitoring the restaurant’s operations to make sure the product is being made properly and efficiently and that customers are kept happy.

In other words, as far as Pac Pizza is concerned, the manager is running the show, and the buck stops with the manager. Pac Pizza needs to have someone who is ultimately responsible for what happens in the restaurant, and that person is the restaurant manager. That is why Pac Pizza is willing to pay its managers as much as $41,000 per year and make them eligible for bonuses. They are paid far more than crew members. If the restaurant managers were just being paid to make pizzas or to do other crew work, Pac Pizza would pay them a lot less money.

My point in telling you all of this is that the ongoing duties of supervising employees and monitoring restaurant operations are duties that should be treated as exempt functions, regardless of whether a restaurant manager is also performing some kind of production work. In other words, it just doesn’t make sense to treat a person with the responsibility our managers perform every hour they work just because they may spend some time helping their crew.
And a manager does not have to just stand there during the lunch rush in order to be a manager. Any list of exempt duties that fails to recognize this reality does a disservice both to employers and to the managers themselves. Pac Pizza, and, I’m sure, many other companies, expects its managers to focus on the restaurant’s operations and employees and attend to those operations and employees throughout the day, even if they may also engage in production work from time to time.

The supervision of operations and employees are the essential duties of the job and the focus of the training given by Pac Pizza to its managers. They are the focus of how the restaurant general managers are evaluated.

Pac Pizza respectfully requests that you recognize these expectations in rules or regulations describing the duties that make a restaurant manager an exempt executive employee.

COMMISSIONER BROAD: Just by way of clarification for me, you have crew members and you have managers. Is there anybody else that’s employed in a Pizza Hut?

MS. TOMLINSON: No.

COMMISSIONER BROAD: And how many managers are there at -- existing generally at a franchise? More than one?

MS. TOMLINSON: There would be more than -- no.
We have a full-time restaurant general manager assigned to every restaurant, and we have shift leaders that are able to deploy resources during the course of the day.

COMMISSIONER BROAD: Okay. So, these shift leaders -- because someone who’s a full-time restaurant manager --

MS. TOMLINSON: Yes.

COMMISSIONER BROAD: -- I can understand. And they would fall within the exemption, probably, now --

MS. TOMLINSON: Right.

COMMISSIONER BROAD: -- because they spend more than half their time engaged in managerial duties. But what you’re reaching for are these lead persons.

MS. TOMLINSON: No, we are not. Just the restaurant general managers.

COMMISSIONER BROAD: So, it wouldn’t be assistant managers or training managers or anybody like that?

MS. TOMLINSON: No.

COMMISSIONER BROAD: Okay. So, this is a person who’s -- now, is that manager there full-time? Are they there all hours of operation?

MS. TOMLINSON: No. They would have at least a 40-hour workweek that they would be responsible for being there. However, they may have to work 50 hours if they’re busy, during a peak period, for example, during a
Thanksgiving period or a holiday period when people are -- a lot of people are off.

COMMISSIONER BROAD: Are you saying, then, your concern is that they spend more than 50 percent of their time now doing -- making pizzas and doing non--

MS. TOMLINSON: No. I’m saying that they spend at least 50 percent of their time doing managerial responsibilities.

COMMISSIONER BROAD: Okay. But what I’m trying to understand is that that would exempt them under current law and under the current rules of the IWC. I’m trying to figure out what you want that you don’t have now.

MS. TOMLINSON: Going forward, we may not -- we may lose that, in January, with AB 60.

COMMISSIONER BROAD: Okay. I just don’t understand how. But maybe you can elucidate for me. I don’t see what is there in AB 60 that changes that. It essentially codified a rule that said -- there was already a rule of the IWC that said people that are primarily engaged in these duties are exempt. And AB 60 put that in statute. And it changed another thing. It said that they had to be making at least twice the minimum wage.

Are these people making twice the minimum wage?

MS. TOMLINSON: Yes, they are.

COMMISSIONER BROAD: Okay. Then I’m -- I’m having
-- I have some difficulty figuring out what is changed for them.

COMMISSIONER DOMBROWSKI: I think that maybe I could -- since I worked for a Pizza Hut once in my life -- the manager -- the manager is often -- I mean, I remember our guy was making pizzas and managing the place. I think what you’re saying is using your head and your hands at the same time, in a lot of situations.

MS. TOMLINSON: Yes. But they are 100 percent --

COMMISSIONER DOMBROWSKI: And you’re wondering where that 50 percent line falls.

MS. TOMLINSON: That’s right. That’s our -- that’s our big issue, because the 50-50 -- because you’re making the distinction between the 100 percent block of time, and you say 50 percent has to be managerial in nature. Where does that line cross over? There is a crossover. While they’re making pizzas, they may very well still be managing a customer relations issue, or they may be directing or delegating tasks to someone at that time as well.

COMMISSIONER CENTER: I agree with Commissioner Broad. I don’t think there’s been a change in the former IWC’s regulation that’s now in statute. So, if you had that exemption under the former exemption, obviously you would have it now with the new law too.
COMMISSIONER BROAD: Yeah. I mean, I guess what
-- it’s possible that we could review it and constrict that.
So, you’re -- what you’re really saying is you’re coming
before us saying you want to maintain the status quo.
MS. TOMLINSON: Yes.
COMMISSIONER BROAD: Okay. That’s -- then that’s
really what I wanted to clarify.
Thank you.
MS. TOMLINSON: Okay.
COMMISSIONER CENTER: Thank you.
MS. TOMLINSON: Thanks.
COMMISSIONER CENTER: Marcie Berman.
MS. BERMAN: My name is Marcie Berman, and I’m
here as a representative of the California Employment
Lawyers Association, which is a group of about 250 attorneys
in California that represents employees and employment-
related litigation of all variety, including wage and hour
types of matters, and in particular, overtime and other
types of wage issue that fall under the wage orders.
And I’m here today to address two types of
concerns that CELA has. One is the procedural issues that
you raised in your agenda that you put out, and another to
respond real briefly to some of the things that have been
said in writing and orally here.
First of all, I would wholeheartedly support all
efforts on your part to communicate as quickly as possible
to everybody concerned about the new rules that go into
effect. And I understand that you’re planning to have
hearings on December 15th for the proposed interim wage
orders that will be finalized shortly thereafter, I guess,
and disseminated to employers. Is that accurate?
COMMISSIONER CENTER: Yeah, that’s pretty close.
MS. BERMAN: Theoretically? All right.
I guess I would ask that you, in addition,
communicate these new rules in other ways too, to make sure
that everybody affected by them is going to be able to find
out about them as quickly as possible. I’m not sure what
your standard procedures are, but if there’s some way that
you could utilize the media or other channels of
communication to ensure that employees find out about these
new rules too, that would be something that we would
recommend.
And in terms of substance of this communication, I
would ask that the Commission be sure to include the new
remuneration provision for the overtime exemptions as part
of this communication, specifically, the new rule in AB 60
that goes into effect immediately on January 1 that requires
that in order to be exempt as an administrator, executive,
or professional, that that individual has to be making at
least twice the state minimum wage.
Another thing that we would ask the Commission to put into these communications, including proposed wage orders and any other form of communication, is some kind of admonishment or advice to employers about potential ways of circumventing the new law. I know that it’s not common sense or intuitive on any of our parts to understand what’s a legitimate loophole and what’s not a legitimate loophole, because it varies. And I think that there are ways in which employers may try to circumvent this law without understanding that it’s not okay to do that. And I think it would be to their advantage to let them know up front that that’s not okay, so that they can lawfully comply with the law and not risk litigation later.

In particular, there’s a provision right in AB 60 itself that speaks to this, that states that — I think it’s new Section — Labor Code Section 511(c) — that states, in essence, that an employer cannot reduce somebody’s base rate in order to fund this new, you know, overtime costs of the alternative workweek and 8-hour overtime provisions. I would ask that that be specifically included in your wage order and communications to the public.

Secondly, there are — we’ve found that there are other ways in which employers sometimes try to circumvent overtime and other kinds of wage and hour laws by taking something away from a non- — a non-wage payment to
employees to fund an employer’s overtime liability. For example, there are situations in which employers may lease equipment from an employee who does work for them, you know, a rig or some kind of equipment that the employee has, and the employer will lease that equipment. And during weeks when that employee works overtime, the employer will reduce the lease payments to that employee in the exact amount that the employer has to pay in overtime.

And whenever that situation comes up, the courts have unanimously said you can’t do that. That just fatally undermines the overtime laws. It’s a violation of the overtime laws, and it’s just not okay to do that. So, I would certainly want employers to know up front that that’s not an acceptable way to fund their costs under this new legislation.

Another implementation issue -- I guess it’s not really immediate implementation, but I want to respond to all of the various requests that I’ve heard and read from last week’s presentation wherein employers are making requests that you change the overtime exemptions, the administrative, managerial, and professional exemptions, one way or another. I understand that AB 60 does include a provision that requires the Commission to, quote, “review” these matters. However, it doesn’t include any kind of time deadline for you to do that. It just says that you have to
review it. The only thing it says in terms of time deadlines is that if you want to change anything, and if you want to make those changes without convening wage boards, then you’ve got to do it by July 1st, year 2000.

And it would be my recommendation that you not rush into doing that right now. It certainly seems like you’ve got a full plate, just dealing with the things that the law requires you to get done by July 1st, in terms of the regulations for the alternative workweek elections and related issues. Overtime exemptions are a very complicated type of issue that have really dramatic ramifications whenever they’re tinkered with. And I know from my own personal legal practice that there are still a lot of abuse of overtime law in California, and there are class action lawsuits throughout the state, ongoing and being filed every week, that are a reaction to the abuses that still exist.

So, it certainly would be the position of CELA that the current law needs to be enforced better. And indeed, we would actually have recommendations for narrowing the exemptions so that fewer individuals would be exempted from overtime. But I don’t want to address all that now, because I think that, you know, it’s better done after the big press of business regarding the alternative workweeks, at which time I would recommend that you look at it very carefully and make use of the wage board, advisory wage
boards, and we’ll come to you at that time with our specific recommendations.

The other thing I wanted to respond to that’s been said here is that -- a lot of what I’m hearing seems to be people asking you to dismantle AB 60. There are some things that AB 60 gives this Commission discretion to do, but there is a lot of AB 60 that’s set in stone, and it doesn’t give the Commission authority to undo it.

And I just want to state for the record that those aspects of AB 60 can’t be undone. There’s no room to interpret them out of the law. And I think it’s inappropriate for requests to be made that the Commission undo something that can’t be undone.

I do have some specific responses to some of the proposals that have been made to change the overtime exemptions, but what I’ll do is submit something in writing to you to address that and not take up any more of your time today.

COMMISSIONER CENTER: Thank you very much.

Any questions?

(No response)

COMMISSIONER CENTER: I think we can get the nurses in before their shifts now.

MS. SKINNER: Good afternoon. My name is Gail Skinner, and I’m a registered nurse here in San Francisco.
I work in a critical care unit at California Pacific Medical Center.

I work 12-hour shifts, and I’d like to continue to have the option to work those 12-hour shifts. For me, I find that 12-hour shifts allow me better continuity of patient care. I work day shift predominantly, and when I start my shift at seven o’clock in the morning and get my assignment and get report, I pretty much have a plan of care with the physician and the other healthcare professionals on the team about what’s going to happen with my patient or patients during that shift. And I have a full 12 hours to work that plan with the patient and with the patient’s family. And so, it’s very useful to have -- to be there for 12 hours for my patients.

As recently as Friday of this last week, I was involved in a very sensitive situation with a patient and family who were struggling to make a decision to withdraw life support. And when we started the process -- again, when I began my shift at seven o’clock in the morning -- I was able to reassure the family and the patient that I was the nurse with them for that 12 hours, and that I would be working with them as they struggled with this issue and made their decisions.

And, by the way, I was -- as painful as that can be, I felt very privileged to be part of that process.
Another reason that 12-hour shifts work for me is I have improved opportunities to participate in professional nursing organizations. I’m a member of the Nursing Pain Association, and I’m a member of the American Association of Critical Care Nurses. And not having to work five days in a week, and just work three days in a week, frees up time for me to attend meetings and to participate in seminars and do some teaching within those professional memberships.

Also, I have increased opportunity with more days off during the week to take continuing education and to have more options for what kinds of continuing education I take.

On a personal level, I have more time to spend with family. And I don’t have children, but my co-workers who have children asked that I bring to you that they appreciate having opportunity to attend school events and participate in other activities with their children and be at work less days of the week in working 12 hours.

The commute is better for some of my co-workers. I have worked at my hospital for sixteen years, and I work with nurses who’ve been there for -- some of them, for as long as twenty or twenty-five years, and some of them commute from a distance. And they continue to commute from Santa Rosa or Vallejo, for instance, because of the option of the 12-hour shifts.

There’s more time to participate in other
community activities like volunteering. And for myself, I’m a docent at the San Francisco Zoo, so having extra days off during the week allows me to do tour guides with school groups, and I very much enjoy that. There’s more time for recreation and rejuvenating. I feel like I’m a better nurse and I’m a happier nurse because I do 12-hour shifts and I have more days off during the week.

And with regard to time off during the week, it’s certainly more convenient for me to run my errands and do grocery shopping on weekdays, when maybe everybody else is at work, and I can get my things done.

Thank you for the opportunity to speak.

This is my colleague, Mary Chris Vallario.

MS. VALLARIO: And I work in an emergency room here for a local hospital. I also work a combination of 12- and 8-hour shifts.

And I sit on the local committee that represents emergency departments throughout San Francisco, and I can tell you that as word is beginning to seep out slowly to the rank and file that they may lose their option for 12-hour shifts, I think distraught would probably describe it pretty accurately.

A few years ago -- I’ve been working as a nurse for 32 years, and a few years ago, nurses were first given the option to work 12-hour shifts, and at that time they
were paid time and a half for the last four hours. And this looked like a real good deal to the nurses, and many of them signed up for it. And then, several years later, the administration came back and said, “We’re going to take that away; we’ll still give you the opportunity to work 12-hour shifts, but we will no longer pay the last four hours at time and a half.” At that time, I think both the administration and the nurses, everybody was grumbling, and everyone felt that the nurses would immediately drop off 12-hour shifts and go back to 8-hours.

But much to everyone’s surprise, once given the option to work 12-hour shifts, the professional nurses much preferred to continue to do that, for all of the reasons that Gail has articulated and that our colleague from John Muir, in respiratory therapy, gave you already. It simply is a difficult job. Obviously, intensive care and emergency room nursing is a very intense field, and the ability to do it three days a week versus five days a week makes a huge difference. I find, as I get older, I can recuperate much better if I’m doing 12-hour shifts three times a week.

In our particular department, we allow the nurses to take a vote, and we have a mixed unit of some people doing 8-hours, some people doing 12-hours. I am personally involved in the staffing. It makes it much easier for me to staff the department with that combination of shifts. It
makes it easier for me to retain nurses. I think that if we lose the option of 12-hour shifts, we will see nurses leaving.

And currently there is a dearth of nurses in specialty care areas. As managed care has affected healthcare -- and California has been the vanguard in that -- and hospitals have gotten leaner and meaner, they have started to cut what is now perceived of as “fluff,” for want of a better word. And one of the areas of fluff is training. And one of the things that’s been cut is training programs for specialty care areas. So, there is currently a lack of nurses for CCU, ICU, and emergency room departments, operating room nurses, cardiac, for example. And being able to retain those nurses is critical.

The administration has always worked very closely with the nurses in hospitals to try to give them what the nurses perceive as the best situation they can get. And flexible scheduling has been a huge issue, across the board.

There may be some instances of hospitals in the state where nurses are taken advantage of, being asked to work double shifts, which no one should have to do. But I personally have -- I have no information about that. And certainly, here locally, that is not the case. Hospitals want to retain all these nurses. They know that the nurses want flexible scheduling, and they’re willing to accommodate
that.

So, I would strongly hope that any -- that we will be able to be an exemption from this law, as far as professional nurses go.

I think -- I understand that your role is to protect workers from being abused, but I would argue that professional nurses have the ability to negotiate directly with hospital administrators, and we have done that successfully. And in certain hospitals, for example, in San Francisco, where the nurses are members of the California Nursing Association, if they get into difficulties with scheduling problems, they can negotiate through their bargaining unit. So, at least in this area, it has not been an issue.

Thank you.

COMMISSIONER CENTER: Thank you.

MS. VALLARIO: Any questions?

COMMISSIONER BROAD: Yeah. I have a question. How would people -- you say you have people, some of whom work 8-hour shifts, some of whom work 12-hour shifts. Would the people who work 8-hour shifts be unhappy if they were told that they were going to work 12-hour shifts?

MS. VALLARIO: No, but we would just have the option. I think that’s the key to this whole thing, is you don’t have to work either 12 or 8, but you have the option
to work with your individual unit supervisor, to work out
the best shifts for your particular unit. That’s what I
would like to see retained, is the option.

We would continue to work a mix of 12- and 8-hour
shifts.

COMMISSIONER BROAD: See, I’m not sure what you
have is really what the law gives employers the right to do.
It basically allows the employer to determine what shifts
people will work at. You happen to be in some kind of
employment context where the employer has given you great
latitude to choose shifts. But it would be within the
employer’s right to say, “Look, we’re doing 12-hour shifts,
no more of this 8-hour stuff,” just as they earlier stopped
paying you overtime and lowered your wage base at that time
-- right? I mean --

MS. VALLARIO: Right. But employers are not
stupid. They can’t run the hospital without the nurses, and
there aren’t enough nurses, particularly specialty nurses.
So, if you want to retain those nurses and be competitive in
your area, you more or less have to sit down and negotiate
with them, and that is a huge issue, probably, at this
point, more than pay, is flexible scheduling for nurses.

COMMISSIONER BROAD: Okay. Now, let me ask you
this question. Would you think that the other staff that
are non-professional in hospitals, like janitors and food
service people and other persons, nursing assistants, have
the same kind of bargaining chits to play with employers in
the healthcare industry?

MS. VALLARIO: I think the employers try to be
very careful with this, because it frequently runs up
against union issues. And they don’t have a lot of leeway
with that. At least in the institutions that I’m familiar
with, the non-nursing personnel are generally all working 8-
hour shifts.

I have people that are working in our unit that
are clerical workers who would much prefer to work longer
shifts and not commute. And they currently are asked to
work 8-hour shifts. And the employer tries to be very
careful with it because they don’t want to run into union
issues.

So, that’s something that they would need to
discuss directly with their union representation, if that’s
something they want written into their contracts.

COMMISSIONER BROAD: Thank you.

MR. BARON: I guess, on this issue of non-direct
care employees, I know that while it was said earlier that,
as far as they knew, that it was always under an 8-hour. I
see he had to leave, but I guess Tom Luevano, from Sutter
Health, would want to come up and say that it is true, in
instances, that folks in non-care are working a longer
shift, longer than 8 hours.

MS. VALLARIO: Anything else?

COMMISSIONER CENTER: No. Thank you.

MS. VALLARIO: Thank you.

COMMISSIONER CENTER: Let me make sure Andy gives me my microphone back.

Jonathan Mayes and Ron Bingham -- or Bingaman.

MR. MAYES: Chairman Center and commissioners, good afternoon. I’m Jonathan Mayes, and I have the good fortune of serving as the vice president of government relations at Safeway. Safeway operates 517 stores in California, under the names Vons, Pavilions, Pak-n-Save. We employ about 57,000 employees. We also operate a number of pharmacies. We operate 250 pharmacies in California, employing over 600 pharmacists.

We’re here to talk to you about a couple of issues related to alternate work schedules. And I’d like to introduce Ron Bingaman, who’s been a pharmacist for over 28 years, to talk to you about what our perspective is on some of these work hours issues that have been addressed already earlier today.

Mr. Bingaman.

MR. BINGAMAN: Thanks, Jonathan.

Chairman Center, commissioners, I recently had the opportunity to meet with a group of our pharmacists, about
32 of them. From comments earlier about the pharmacist shortage, I hope you can appreciate the difficulty in getting that many pharmacists together at one time. So, this issue was discussed in terms of the flex scheduling and, as of January 1st, to get a sensitivity check on what their feelings were. And I’d like to break those down and present those to you at this time.

First of all, I’d make the offer that if live bodies are preferred, please let me know and we’ll see what arrangements we can make for the December 15th meeting.

I would like to give you a sensitivity check on what I learned at this meeting. Basically, the comments ranged in three areas.

First were professional -- excuse me -- first was personal and family time. Under these, a vast majority of the pharmacists felt it very important to have more continuous time, in terms of hours and days off per week, particularly in coordinating with their spouse when she may be working.

Another area that was particularly important was childcare, home care, and, in one instance, home schooling, that a flex scheduled was needed to be able to continue their home schooling program with their children.

The next area had to do with business. Several of them had additional part-time jobs. With the shortage,
there are various business opportunities out there where they can work an extra shift or two. And the flex scheduling was very important to be able to continue that. And the third was in the area of their profession. Several of them take continuing education and pharmacy courses. Also, some of them take advanced education courses, M.B.A., this type of thing, where flex scheduling would enable them to be able to have the time necessary to participate in these programs.

And then, the third area in the professional has to do with community activities, community services. Several of them volunteer for senior programs, brown bag sessions, this type of thing, where they donate their time and expertise to the community.

I’d like to talk just a moment about flex scheduling. And I understand that there’s an option of four 10’s, and I’d like to address that issue for just a moment, how, in my opinion, in a retail pharmacy, four 10’s are not appropriate as some other flex schedules might be. And we’ll talk about those in just a moment.

First of all, pharmacies do maintain some 24-hour stores. So, the same arguments that you’ve heard earlier about shift and -- would be the same.

The second thing is, traditionally the hours of business where you see the most business, the most people
coming into stores, is a little bit longer than 10 hours. A
12-hour shift would cover the bulk of this business. If you
take a 24-hour store business and look at the times where
the register is being rung the most, it’s over 10 hours, but
usually 12 hours or less.

Now, another flex schedule option I’d like you
might consider instead of four 10’s would be two 8’s and two
12’s. In a pharmacy, some of the days of the week are
particularly stronger in business, more likely than others.
So, let’s say, if a pharmacy is traditionally open 12 hours,
let’s say that Mondays and Fridays are traditionally busy.
We could have two 8-hour shifts and overlap 4 hours, and
that’s some extra pharmacist time to be able to handle the
additional pharmacist calls or additional patient calls,
rather than compared to the mid-days that are less busy,
Tuesday, Wednesdays, Sundays, this type of thing. So, a
combination of two 8’s and two 12’s would be a stronger flex
schedule in retail pharmacy than perhaps four 10’s.

Another element of a flex schedule that I’d like
you to consider would be, in the rural communities, out in
the smaller areas and towns that maybe just have one store,
one pharmacy, where we staff with two pharmacists, now, to
ensure a quality of shift, they need to be able to have flex
scheduling so that, overall, the total number of morning and
evening shifts are the same, each has every other weekend
off, and the overall average hours between the two weeks are even. Now, to do this, because one person is working the weekend and has the next weekend off, you get into a flex situation where it is needed that we have a workweek the first week of, say, 36 hours, and then a second week of 44 hours. But overall, between the two weeks, everything is averaged out, days, nights, weekends on and off, this type of thing.

In closing my comments, I would simply say that we at Safeway support the right of our pharmacists to choose their work schedule, and I would urge the Commission to maintain that flexibility.

MR. MAYES: There’s been some discussion earlier about the notion of caps, and we’ve heard about alleged abuses where someone may be working 16 hours, 15 hours a day. Our perspective is that we want to provide hours to our pharmacists that also work well for them, because much like what was said earlier in connection with hospitals and nurses, pharmacists are in short supply, and so, in order to keep them, we want to work with them in ways that work well for ourselves and for them.

And so, the whole notion of some reasonable cap is very reasonable to us. Something in the area of 12 hours is not unreasonable. As Mr. Bingaman mentioned, 12 hours would work with us. We’ve also had conversation with other retail
establishments, pharmacists and pharmacy chains; 12 hours seems to work well for them as well, in terms of a reasonable cap. And that’s what we would propose.

COMMISSIONER CENTER: Thank you.

Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

Marc Koonin.

MR. KOONIN: Good afternoon, Commissioner Center, the other commissioners. I’m Marc Koonin, and I’m an associate with the law firm of Steinhart and Falconer, LLP, here in San Francisco. We represent employers, amongst other areas, in employment law and wage and hour issues. And we’ve had several employers who are, frankly, confused and concerned because they would like to comply with the law, portions of which are going to go into effect right away on January 1, but they are not really sure how they can do so within a safe harbor.

And I have two issues of particular concern. One issue is that several of our clients run operations in which they do not currently have an alternate work schedule, but they would like to have a seamless work schedule that will go into the next year. However, with the abolition of daily overtime, of course, all of the old wage order alternate workweek provisions are out the door and there’s no interim
guidance. So, what they have asked us to request on their behalf is that the Commission form some sort of a clause that will say that elections that are held in the interim time period will be valid, so long as they meet certain criteria that were acceptable under the old wage orders and under the new statute.

Of course, the one thing that we’re also concerned about is, under the old wage orders, of course, manufacturers had to ratify an election, whereas everybody else had to, in essence, do it in reverse, get the signatures and then have the election. So, we would like some flexibility to the extent that manufacturers who do what would have been valid before in ratifying an election, so long as they comply with all the other old provisions -- two-thirds vote and registry with the state -- we’d like that to be deemed valid. And for non-manufacturing employees (sic) who do it the way that they would have done it under the old wage orders, we would appreciate some regulatory guidance that that’s also proper, so long as they hit the key points.

Another issue that’s come up is the whole issue of a 12-hour workday, only we would like to take a slightly different approach. We have several clients who are manufacturers, and they understand that, pursuant to AB 60, an alternate work schedule for up to 10 hours per day would
be deemed valid. However, they understand that, given the
language, there doesn’t seem to be flexibility for 12 hours
of straight time. So, what they would like to do is as
follows: they would like to implement, with their
employees’ consent, four 10-hour days, for which there would
be 2 hours of mandatory overtime on three or four of those
days. The reason they would like to do this is to cater to
employee preference.

Frankly, several of our clients have employees
who, for reasons discussed here today, would prefer to have
a three 12-hour-day schedule and then have four days off.
However, these -- one of these clients, at least, has been
told by a regional officer of the Division of Labor
Standards Enforcement that that officer would deem such an
alternate work scheduled to be invalid.

We don’t think that it would be invalid because,
historically, employers could require overtime so long as
they were willing to pay for it. And the only practical
alternative is for this employer to go to a swing shift,
because the employer can pay for 6 hours or 8 hours of
weekly overtime, but it just can’t pay 12 to 16 hours, which
would be the only other way of maintaining a 12-hour day if
the alternate work schedule was not deemed to be valid on
those terms.

And the employer will comply with the law, of
course. If it has to, it will go to a swing shift by January 1st. But this will make a lot of its employees unhappy and cause serious morale problems.

So, we would like the Commission to consider that seriously.

And that’s all I have to say this afternoon. And I thank you for your time.

COMMISSIONER BROAD: Yeah. I just had a couple questions for you.

On your first issue, I don’t see how the Commission can declare something valid in advance. In other words, I don’t think we can sort of bless something out there, because that’s really what an enforcement branch does.

I think we can say that you can hold these elections in the interim. I mean, if the wage orders restore the provisions that existed before and we do an interim wage order that says, “Order,” you know, “blank-blank-blank-blank is reinstated, but you -- you know, if you have an alternative workweek arrangement, you have to file it with the Division of Labor Statistics and Research,” because that’s what AB 60 requires, then it would be valid because we’re saying it’s valid.

But I don’t know that we can -- I don’t -- and maybe this is not what you’re looking for, but I don’t think
we can declare something beyond the sort of reach of the
enforcement branch of government, which we’re not.

MR. KOONIN: No. We’re asking for a safe harbor
provision. We’re asking you to, in essence, recognize in
the new wage orders that elections that were held in this
interim period are valid. We believe that there is good
legal argument for that because, in essence, the old wage
orders, to the extent that they do not conflict with AB 60,
go into effect until you adopt something else. So, we think
that we would just like you to explicitly say that, in
essence, to kind of provide a safe harbor so that industry
has a clear signal on that, because it’s a lot easier, from
a business perspective, to do something now and continue
into the new year than, in essence, to wait and do it into
next year. It would be better from the point of view of a
business that wants to comply to, in essence, do it
seamlessly.

And, in essence, what you’d be doing is assisting
employers who want to comply to comply and have a safe
harbor. Even though you can’t do it in advance, you could,
in essence, bless it as of January 1 or whatever date the
new regulations go into effect.

COMMISSIONER CENTER: Okay. Thank you.

Brad Cinto.

MR. CINTO: Good afternoon. My name is Brad
Cinto. I’m a registered pharmacist. I’m from Walgreens Company. Yes, another pharmacist.

I think the common thread here today, from listening and from hearing previous testimony, not only from pharmacy, but from healthcare professionals in general, is a stress for flexibility of scheduling, which, in my opinion, I think to lose that as we have it now, the disadvantages of that are going to far outweigh any advantages that would be gained by the implementation of AB 60 into our profession.

Luckily, we’re in a situation with Walgreens where we don’t see a lot of 12-hour shifts. In fact, no pharmacist is ever scheduled to work a 12-hour shift. We have no pharmacists to schedule any longer shift than a 10-hour shift, which are done by our graveyard pharmacists in our 24-hour stores. So, in essence, our workday isn’t going to be affected a lot by the amount of hours that we work, but more so by the loss in the flexibility of scheduling.

And I have a couple of questions that I’d like to get clarification on, as to what the new law will do in regards to that.

First of all, it’s very common in the pharmacy profession -- I think you’ve heard this point of view stressed earlier today -- that pharmacists work, and it’s a fact of life, that we work an unbalanced schedule. You know, we’re not lucky enough to be in a situation where you
can work a straight 40-hour week and deal with any excess hours as overtime from that point. We work unbalanced weeks, where you work an excess of 40 hours one week, less than that the next. And in a biweekly pay period, that’s going to average out to basically a 40-hour workweek, although it’s not cut-and-dried 8-hour day.

With the new law, I think there will be a lot of restrictions that would really put a lot of pressure on employees to come up with schedules that are going to work. And with the current shortage of pharmacists in the state, it’s going to create a situation where you may not have the bodies to cover those shifts, whereas, with the flexible schedule, you have the bodies there to cover them now.

One of the questions that I’d like to get a clarification on is, as I read through the bill and you talk about the workweek and -- what I’d like to find out is what is the maximum days that could be scheduled for a pharmacist, running from workweek to workweek, without running into an overtime situation? Do you know what that would be?

And the reason I ask that is because, in a lot of situations -- personally, in my situation, my situation is -- my schedule is where I work seven days in a row, I have two days off, I work three days, I have two days off, and then rotate. So, it’s every other weekend, and we work that
weekend the week before you work the full week, so you are
working seven days in a row, five days in one week and five
days in the second week, but it does run into seven
consecutive days. And my concern would be does that
conflict with the new law? Is that going to put -- you
know, put somebody in a situation where that’s no longer
going to be able to be done without having to pay overtime
hours.

I read through the bill, and they talk about the
workweek, but they don’t make -- they talk about the hours
within the workweek, but they don’t talk about -- or not
that I’ve seen -- how that works with consecutive days. I’d
be interested to know if anybody had information as to what
that would do.

COMMISSIONER CENTER: Can you answer the question
about the workweek?

COMMISSIONER BROAD: Well, I think the workweek is
seven days. And on the seventh consecutive day of work,
there’s a special overtime provision. I think employers
have -- I may have this wrong -- this is an issue that
transcends this bill or existed beforehand, which is when
does the workweek start and end. Generally, the workweek
starts on a day that the employer picks, and then the
workweek ends seven days later, and then it starts the next
day, and it goes on like that.
Gentlemen, am I correct?

So that they can’t, you know, shift that around.

Otherwise you’d be working eighteen days in a row.

MR. CINTO: You know, I’m not saying I think they’re going to shift it around. We know what the workweek is.

COMMISSIONER BROAD: Right.

MR. CINTO: But what I’m saying, within the framework of that, is you’re going to run into situations where you may work seven or ten days in a row, but you’re not going to exceed seven days in a workweek.

COMMISSIONER BROAD: That, I believe, is permissible. It -- in other words, you can -- let’s say you have a seven -- you know, seven days, and the first three days you don’t work. You know, it starts on Monday and it ends on Sunday, and the first three days you don’t work. You could then work four days, and then you could work five days, and as long as you didn’t exceed -- right, because that would be the next workweek.

COMMISSIONER DOMBROWSKI: Excuse me, but with all due respect to Barry, he’s not the attorney for the Commission, I believe.

Miles, is that -- could we hear the Department speak to this?

MR. LOCKER: (Not using microphone) Well, if you
want DLSE to speak on it --

THE REPORTER: Come to the mike, please.

MR. LOCKER: -- although the Commission does have an attorney, and I don’t want to, you know, overstep our boundaries, so I’m not sure how you want to proceed with that.

COMMISSIONER CENTER: Go ahead, Miles.

MR. LOCKER: (Not using microphone) Basically --

COMMISSIONER CENTER: Miles, would you come to the mike?

MR. LOCKER: Yeah. Okay. With respect to, you know, how DLSE would enforce this and have -- you know, in -- just in terms of days worked in a workweek, what we look at is the specific workweek. So, what -- it doesn’t matter the number of days worked consecutively, because you can switch -- you can have a day off at the start of a workweek, then six days of work, and then, presumably, some more work, and then a day off in the next workweek.

So, that’s -- in terms of the seventh day of work premium pay, what we’re looking at is the seventh day of work in the workweek.

MR. CINTO: Within the framework of that seven --

MR. LOCKER: Within the workweek, yeah.

MR. CINTO: Once that workweek ends and the new workweek starts, you can back days up, back to back, without
interfering with -- so, what I’m saying is you’re going to work five days, say, in the workweek. That workweek ends on Day 5. The second and new workweek starts on Day 1. When you’re working those days, that’s your sixth day in a row, and if you work the next day, that’s your seventh day in a row. You’re working seven days straight, five days in one workweek and the sixth and seventh day are Days 1 and 2 of the new workweek. Is that going to be allowable?

MR. LOCKER: It would be allowable because, again, what we’re looking at is for the week. And so, for example, if you have, let’s say, two days off at the start of the workweek, and then you work the next five days, and the next workweek, which is the same collection of seventh days, starting at the same time, ending at the same time, same workweek structure, but the work schedules shift in that second workweek so that you’re on at the beginning of the workweek, and your days off happen at the end of that workweek, then that’s okay.

COMMISSIONER CENTER: Thank you, Miles.

And any other specific enforcement questions from the industry, Miles is here for a long time today. He’ll talk to you individually.

MR. LOCKER: I’ll just hang out.

COMMISSIONER CENTER: Okay.

MR. CINTO: The only other thing I’d like to say
in regards to this point is it does seem to be the one issue
that seems to be a sticking point, is the flexible schedule,
is that it really is advantageous in our profession to have
that, for a lot of reasons, some of which are out of our
control.

And as I understand it, it is appropriate for you
as the Commission to consider this and consider the
exemption that we’re asking for. If I’m understanding what
I’ve heard today in previous testimony, that is something
that you do have the authority or the power to do. So, I
would ask you respectfully that you consider that very
seriously and take that to heart, because it really will
affect the lives of a lot of people. If -- not necessarily,
we have to work under the new wage requirements, but if it’s
structured to where we lose that flexibility, it really does
create a lot of inconvenience for people in their -- not
only their business lives, but their personal lives. And I
would appreciate it if that would be taken into
consideration.

COMMISSIONER CENTER: Thank you.

MR. CHENG: My name is Francis Cheng, and I have
been a -- have been a pharmacist here since ’76, and I have
worked approximately about seven years with a retail clerk
store. And since then, I have been with Longs. And right
now, presently, I’m working as a manager.
And basically, I’m supporting the whole thing about, you know, my own colleagues from Longs, and they were talking about, you know, the flexibility and the profession. And I’m not going to go into detail about what we do. You know, I’m sure that you guys are fully aware of what we do now, by now. If not, then, I’m inviting the commissioners to come over to our store, or to Longs, to visit.

Unfortunately, I’m sorry that Commissioner Broad had a bad experience at Rite-Aid.

Most of us, we don’t work -- the reason why I quit a union store is basically -- it just doesn’t work, the 8-hour shift and then the mandatory 15 minutes or you go to lunch. It just doesn’t work. My priority is patient. My patient is my -- is my livelihood. If they don’t come, I don’t have a job. And that’s what I’m trained for, and that’s why I’m going to take care of them.

So, I cannot have an old lady that comes in three hours in the emergency room and say, “Hey, I’m sorry, I’ve got to go to lunch. I’ve got to close half an hour. When you come back, then I’ll fill the prescription.” I will stay and take care of their business. That’s the main thing.

The flexibility will give us that aid that I can. And I’m also a -- you know, a certified management consultant for Blue Cross and Blue Shield, and I cannot, I
mean, do the job and say, “Hey, this is an 8-hour job and I can’t do it.” And I just -- when the patient needs to call me and I’m there, and I think, you know, the other healthcare, the nurse, I think testified to that fact, that they do that. And just like what I said, and I sincerely request that you guys take it into your heart and, you know, look into the pharmacy profession, whether this is an appropriate category to be exempt.

Thank you.

COMMISSIONER CENTER: Thank you.

Patricia Breslin.

(No response)

COMMISSIONER CENTER: Jim Merrill.

MR. MERRILL: Good afternoon, commissioners. I’m Jim Merrill, and I’m the liaison manager for United Defense, formerly FMC Corporation, and we have approximately 1,000 workers down in San Jose. And I’m also the past president of the Santa Clara Valley Chapter of Society of Resource Management.

My questions to you involve the implementation of AB 60 in a couple of areas.

One, in that implementation, does the ultimate work schedule provide for make-up opportunities for employees? I wasn’t quite clear on that. Is that an affirmative?
MR. BARON: Yeah.

MR. MERRILL: So, if someone had a 10 -- four 10-hour days and worked Monday through Thursday of a given week, with their manager’s approval, they could come in -- take Monday off and work on Friday without any penalty of overtime. Is that correct?

COMMISSIONER CENTER: The existing week, right?

MR. BARON: Yeah. If you look at Section 7 of the bill, 513, it says:

“If an employer approves a written request of an employee to make up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the work time was lost, may not be counted towards computing the total number of hours worked in a day for purposes of the overtime requirements . . . except for hours in excess of 11 hours of work in one day or 40 hours in one workweek.”

And they talked about a signed written request, and it says that an employer is -- that comes from the employee, and:

“An employer is prohibited from encouraging or otherwise soliciting an employee to request the employer’s approval to take
personal time off and make up the work hours
within the same week pursuant to this
section."

There is that opportunity within that same workweek, up to
11 hours and 40 hours in a workweek, to have that kind of
make-up time.

MR. MERRILL: Okay. Thank you for that
clarification.

The second point I wanted to make, get
clarification on, is the seventh workday of the workweek.
Our workweek is Saturday through Friday, and I understand if
you work seven consecutive days, you get paid time and a
half for that seventh day, up to 8 hours, and double time
for over 8.

However, is there any penalty for an employee who
works the seventh day of the workweek even though they may
not work up to 40 that week? There’s some ambiguity, as I
understand it, in the text of the law that talks about the
seventh day of the workweek. And I think it implies that
it’s the seventh consecutive day that you would be paid time
and a half or double time. And it has nothing to do with
the seventh day itself.

MR. BARON: Again, if you look at Section 510,
which, to be frank, there have been clearer sections of
bills in our time, but there is a -- besides the issue of 40
hours on a workweek, it also talks about the first 8 hours
worked on the seventh day of work in any one workweek.

I don’t know if what you were telling me was that
-- is that somebody was working over 8 hours in that -- on
which day.

MR. MERRILL: Well, what I was saying is that I
understand that if you work seven consecutive days, that’s
there in the law. And when you don’t work -- when you don’t
work seven consecutive days, is there any penalty that, on
the seventh day of the workweek, which, in our case, would
be Friday, no matter what they worked the other days,
there’s some overtime penalty for working that seventh day.

COMMISSIONER CENTER: It really would be helpful
-- our last speaker is the sponsor of the bill.

MR. MERRILL: Okay.

COMMISSIONER CENTER: And some of those gray areas
are things you might want to address to him.

MR. MERRILL: Okay. I leave that on the table.

And that’s my whole -- my two questions.

Thank you very much for your time.

COMMISSIONER CENTER: Thank you.

Yeah, you want to talk to him outside? All right.

MR. LOCKER: Yeah, just real quick on that.

Actually, on that last question there, this is
something that -- this is probably one of the most
frequently asked questions that DLSE has had on AB 60 in the past couple months. And we anticipate this is -- we have a bunch of opinion letters in the pipeline that are about to be sprung out any day now, and one of these is going to address this issue. And, you know, so we’re moving along. And I can tell you what --

COMMISSIONER CENTER: I want to get copies of those.

MR. LOCKER: I can assure you that, pursuant to what -- I believe it’s Labor Code Section 1198.4 says, that any interpretation of the Labor Commissioner regarding any IWC order will go directly to the IWC’s executive director there. And hopefully, everyone will get copied with it.

COMMISSIONER CENTER: Thank you.

MR. LOCKER: So, I don’t think we’re going to have any problem. I can assure you of that.

To date, we haven’t issued any opinion letters on AB 60, so, you know, there’s really nothing yet to go out. But I can say this, because we’ve been answering this question to people on the telephone, and I can tell you what our conclusion is on this, what our view is on this: that if you look at Section 510, what it talks about is -- and that’s Section 4 of AB 60 -- what it talks about is basically seventh day premium pay, we’ll call it, as a component of overtime. And it talks about, for the seventh
day of work in any one workweek, the first 8 hours must be
compensated at the rate of one and a half times the regular
rate of pay.

Then, in a little bit of perhaps sloppy drafting,
when it talks about -- it goes on to say any work in excess
of 8 hours on any seventh day of the workweek shall be
compensated at a rate of no less than twice the regular rate
of pay. And the question is, when it talks about the double
time provision on the seventh day of a workweek, are they
talking about the seventh day of work in that workweek? And
our conclusion is yes, they absolutely -- it has to be the
seventh consecutive day of work in that workweek, because,
if you think about it for a minute, it would really make
very little sense, because what you’d be getting then is
you’d be -- on a worker who, let’s say, hasn’t worked -- a
part-time worker who hasn’t worked 40 hours in a week who
happens to -- you know, just a fortuity -- being working on
the seventh day of that workweek. And maybe it’s the only
day that worker works. The first 8 hours, he or she would
be paid at straight time, and then it would jump up to
double time, and that really -- that would really be an
anomaly that -- there’s just no way that was intended.

And we’ll completely address this in greater depth
in the letter, but I can assure you that’s how we’re
interpreting it.
COMMISSIONER CENTER: Thank you.

Susan Kraft.

MS. KRAFT: My name is Susan Kraft, and I’m the HR manager for a small 50-employee company called Safe, Incorporated, which stands for Security Loan Financing and Filers, Incorporated.

And I’m here -- actually, I’m going to change the subject a little bit from the whole entire day, and I want to talk about the payroll personnel liable for funds.

Actually, I’m just going to keep it short. And I just want to say a couple of concerns that we have. And that would be, we are very concerned with being able to hire for the payroll position because we would have to disclose to a potential candidate the liability involved in their accepting a payroll position.

I might also like to state that if someone endeavors to perform his or her job with honesty and integrity, it seems unfair therefore to penalize them for a simple error or oversight. And I’d really like to know how this came about, to charge the payroll employee clerk a fine -- first fine of $50, which I think everybody knows an employer is not going to have the employee pay this fine. You know the employer is going to pay this fine. But how did this come about? That’s what I want to know.

COMMISSIONER CENTER: I think our last speaker
will address that.

(Laughter)

MS. KRAFT: Also, I would like to submit today two signed letters, and then, later on, also, I will be mailing other letters. And I would like to submit that letter. I really, really would like an answer on this, because I think everyone is human and I think everyone makes mistakes.

COMMISSIONER CENTER: Thank you.

Tom Rankin.

MR. RANKIN: Well, it’s not surprising that a bill of this magnitude raises a lot of questions. But I’d like to begin with a little history of why we’re here, because we’re really not here because of -- we’re here because what happened over the last couple of decades, or the last part of it, the IWC basically forgot what its mission was, which was to protect the workers of the State of California. And there were some signs of that, oh --

COMMISSIONER CENTER: You might want to identify yourself.

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

In, for instance, in 1987, when they adopted a minimum wage, they took it upon -- by “they,” I say “they” because none of you guys were on it then -- they took it
upon themselves to try to circumvent the statute, which
prevented tips from being credited against the minimum wage
-- clear -- clearly outside of their authority.

Then, in 1989, I think they forgot that the
workers were their clients and not the employers, and they
began to institute 12-hour days in several wage orders.

In the 1990’s, we went through a period of nine
years without an increase in the minimum wage, even though
the IWC’s statutory duty was to review it every couple years
and make sure it was high enough to provide the necessary
costs of proper living. The result there was we had -- the
result of a tip credit was, there was a court action and the
IWC was overturned. Well, the result of not raising the
minimum wage was that we had Proposition 210, which
increased the minimum wage.

And then, the final blow was in 1998, when the IWC
basically simply became the tool of the then-Governor of the
State of California and did his bidding and did away with
overtime in five wage orders, basically costing the workers
of this state about a billion dollars a year.

That’s why we’re here. AB 60 was a reaction to
that. AB 60 was the result of the Legislature deciding that
it wasn’t going to risk something as important to the
workers of the State of California as overtime pay, it
wasn’t going to just leave that up totally to the IWC. So,
what it did was it put certain protections into statute, and
it threw a lot of decisions to you to make, as to how the
statute should be implemented and whether or not exemptions
should be made and so forth.

But that’s why we’re here. It’s because the IWC
basically forgot who its client was. And now we have a
reconstituted IWC, and I think we’ll see a different result.

But in terms of the immediate task, we’ve heard a
lot of talk about problems of the 12-hour day in
manufacturing. That’s done. I mean, the Legislature
decided that. The Legislature also decided that pharmacists
were not going to be exempted as professionals, and I find
it absolutely mind-boggling that the industry employing
pharmacists now comes in and says, “Yeah, but we should
exempt them as administrative employees.” This is amazing.
Pharmacists are in the same position as nurses. Nurses
specifically are not exempted as professionals. They may,
on a case-by-case basis, be exempted as administrative. But
you’re not here -- believe me, if you want to carry out the
intent of the Legislature -- to rewrite the definition of
administrative employee so all the pharmacists, who the
Legislature just decided should get overtime pay, are now
going to be exempted from overtime pay because they’re
administrators. It really -- it really -- it really boggles
the mind, that one.
But what you have to do immediately, I think, is to provide clarification for both employees and employers about what’s going to happen January 1st. And there are certain things that are set in the statute. The Legislature put them in the statute. That’s what those workers need to know, because a lot of workers were forced, whether they liked it or not, without any say in it, in the last couple years, to work 10-hour days, 12-hour days, without overtime. They’re not in that position any more, and they have to know that they are eligible for overtime if they’re working more than 8 hours a day.

So, that, I think, is your main duty. And then there are other -- so, notice things that need to be done. I think it’s clear from testimony of the Labor Commissioner, it’s also our position and was very clear when this bill was going through the Legislature, that construction and those other two or three industries are covered by statutory overtime effective January 1. Look at the analysis of the bill. Everyone knew this. The Chamber of Commerce was complaining about it. This was one of their arguments against the bill. And we have people now coming here and saying, “What’s going on? We’re covered?” Well, of course they’re covered. It’s too late to change that one.

Now, you know, what happens in the lawsuit saying that they were covered all along by Wage Order 4 is another
thing. But whether the plaintiffs in that suit prevail or not, the statute says they’re covered January 1st. So, I don’t think -- but I do think that they need to be notified, and the employees in the industries need to be notified that that’s the case, as of January 1st they’re entitled to overtime after 8 hours a day.

I think also you need to notify both workers and employers of the new wage test for the managerial, professional, and administrative exemptions. And that’s the difference there. The Legislature didn’t play around with the 51 percent rule. The Legislature increased the dollar amount needed to be a manager, and it said to you, “You should review the duties.” It didn’t say you had to change them, and it certainly did nothing to the 51 percent rule. The simplest thing there probably is just to leave it alone. You have to review it.

But it wasn’t -- there was no intent to have a wholesale change in that part of the law. That part of the law is pretty well settled. The main thing to know there is there’s a new wage criteria.

Then, I think employees should be informed of the new rights they have to request what we call make-up time, to request time off and that they can make it up later in the week without being paid overtime. And I think it’s important that you do that so that employers don’t -- you
know, if someone testified about their concern because employers aren’t allowed to solicit. Well, the simplest way to solve that problem is to is for an IWC notice to go out, which employers could post, and the IWC has notified employers (sic), and then there’s no -- employees, and then there’s no question about employers soliciting people to take make-up time.

Finally, I think you need to deal perhaps with the procedure for an employee to request a continuation of an alternative workweek that was in place before July 1, 1999. This provision was put into the bill at a relatively late date, and it basically says that if the employee was voluntarily -- and I stress the word “voluntarily” -- working, say, a 10-hour day before July 1st, 1999, they can go to the employer with a written request and say, “I want to continue on that 10-hour day,” and the employer has to let them continue a 10-hour day. And, you know, we want -- we want this implemented fairly, and we want it made clear that employers -- we don’t want employers abusing this. So, if they instituted a change, a 10- or 12-hour day, by fiat, they’re not going to go around to employees and say, “You’d better sign something asking to continue on that day.” That’s not the way this is supposed to work. This provision was put in to benefit workers, not to benefit employers who don’t want to pay overtime pay.
So, you have a lot to do, I think, at your January meeting and before then, to get these things ready.

And all this myriad of other issues, about exemptions and you have to deal with election procedures and so forth, that should be your second task. But I think, right now, you need to concentrate on how to have a smooth transition to this new situation January 1 of 2000. And it, I’m sure, will be a smoother transition than the transition that many employees faced when they were suddenly told, when the new IWC wage orders went into effect, “You’re not getting overtime and you’re not getting double time any more for working 12 hours a day, you’re not getting overtime for working 8 hours a day, you’re out of luck.” Employees had no transition whatsoever.

So, I’m looking forward to working on your new regulations. We will be providing you with our suggestions in terms of the areas that I mentioned that need notification on January -- as soon as possible in January.

COMMISSIONER BROAD: Tom, would you make sure that you comment on two things, the collective bargaining exemption, which has this language in it that says “premium” -- requires -- “the exemption only applies if the agreement provides premium pay wage rates for all overtime hours worked,” whereas the old wage orders said “for overtime hours worked.” It’s caused a bit of confusion and we’d like
your input, I think. At least I would like your input as to what you meant by that and how we should be interpreting that, because that’s something that goes into effect January 1 as well.

And secondly, with respect to those four industries, I think it would be helpful if the legislative history suggests that this issue was clear before the Legislature and the Legislature understood that these industries would be covered on January 1, that we have in our record evidence of that legislative history, whether it’s the letters of opposition from the Chamber of Commerce or committee analyses, or whatever.

MR. RANKIN: Okay. Thank you.

COMMISSIONER CENTER: Maybe comment here to our other speaker about the payroll clerk being liable. Is there a little bit more on that?

MR. RANKIN: Oh, yeah. That, I -- I don’t think that’s new language in this bill. It’s not meant to -- that a payroll clerk would be liable; it’s meant that someone who acts with a higher degree of authority for the employer than a payroll clerk. That’s at least the Labor Commissioner’s interpretation, and I would agree with that. It’s not meant to someone -- a bookkeeper is personally liable.

COMMISSIONER BROAD: So, it would be like if you are an employer and you use ADP or Paychecks to do your
payroll service, and they just stop paying the people the
right wage or don’t calculate overtime, that entity could be
-- I’m not sure what it --

MR. RANKIN: Well, I hadn’t thought of that.

Maybe Miles has an answer to that one.

You’re saying ADP does this, you give them the --

the employer gives them the right records and they are then

playing games with their payroll?

COMMISSIONER BROAD: Something happens where

people are just paid inaccurately for, say, a long period of
time. That could happen easily. You know, they misclassify

someone -- I don’t know.

MR. LOCKER: Well, I think the intent here, and

the way the Labor Commissioner intends to enforce this is,

first of all, any penalty -- we’re primarily going to be

looking at the employer, because the employer is ultimately

liable for payment of proper overtime. I mean, the employer

might delegate it to some outside payroll service, but

ultimately this is a liability on the employer.

Now, with respect to the language in AB 60 that
talks about the employer or any agent acting on behalf of

the employer, I think what we’re looking at there is, if we

were to take it one step beyond that, I think we’d only be

looking, really, at someone who devises a policy that is an

unlawful policy, someone, for example, let’s say, up the
corporate chain who says, “I don’t care about these pharmacists and what the law says; we’re not paying them overtime, period; I don’t care about the law,” as opposed to the payroll clerk who, you know, is simply being told, “This is how to do the payroll; don’t give these people overtime.” That person doesn’t have a significant, meaningful choice in this matter. So, what we’re really looking at is not who executes the policy, but who would be implementing -- excuse me -- not who implements the policy, but who devises the policy, with that regard.

COMMISSIONER CENTER: Thank you. Any other questions?

Would you like to make comment or --

MR. MILLS: (Not using microphone) It just sounds like the assumption is that somebody’s doing this intentionally. And I think there’s always human error. And what happens in a situation like that?

COMMISSIONER CENTER: You should come up and identify yourself on that.

MR. MILLS: (Not using microphone) I’m Fred Mills.

THE REPORTER: Come up to the mike so we can record.

COMMISSIONER CENTER: We just need the mike to record.
MR. MILLS: I’m Fred Mills, and I was listening to
the response, and it sounded to me like the response was
directed toward somebody making a decision to violate the
law or to not pay overtime. What happens if somebody or a
company makes a mistake?

MR. LOCKER: Well, obviously, in enforcing the
penalty provisions of AB 60, this is something that DLSE is
going to have to go out on a case-by-case basis and decide
whether or not it’s appropriate to issue a penalty.

The law itself, though, provides that an employer
or the person acting on behalf of an employer who violates
or causes to be violated the provisions of this law shall be
subject to a civil penalty. It’s similar right now to what
the Labor Code provides, I believe, the civil penalties with
respect to minimum wage violations. There’s nothing new
here.

And basically, I have to say that ignorance of the
law is not an excuse here. Again, in terms of the
discretion the Labor Commissioner has on a case-by-case
basis to go out and decide whether or not to issue a penalty
or not, that’s going to be something that, you know, the
Labor Commissioner will deal with on a case-by-case basis.
But the law is very clear that the penalty, you know,
attaches based on a violation of the law, period.

COMMISSIONER BROAD: The one thing that’s, you
know, from the perspective of the payroll clerk, is we really don’t want employers to create some kind of scheme where they cook up some thing, wink and a nod, they don’t -- you know, “Don’t violate the law,” but the message is sent out to a payroll clerk, who then becomes the fall person for some scheme which they’re ordered to do. And that would be really bad.

MR. LOCKER: Well, I think, precisely. That’s why the Labor -- I mean, despite the language in there that talks about any agent of the employer who causes to be violated or violates these provisions, clearly what we’re not looking at is -- we’re not looking down a chain and seeing, you know, ultimately someone’s told to do something and they have to do it. The payroll clerk, to keep his or her job, has to do this. That’s not what this penalty is about. I mean, that’s -- I can assure everyone here that that’s not the way the Labor Commissioner intends to enforce this.

COMMISSIONER CENTER: Thank you.
And, Tom, you’ll get that information to us?
MR. RANKIN: Yes.
COMMISSIONER CENTER: Anyone else who would like to address the Commission?
MR. EWERT: Chairman Center, members of the Commission, I’ll make this real brief. My name is Jim
Ewert, from the California Newspaper Publishers Association. And we just learned today, as everybody did, that you intend to release the draft regulations for the next meeting on December 15th. And we just urge you to provide as much notice as possible and to get those regulations out so that the public has as much opportunity to review the draft regulations as they possibly can and provide you with good, salient comments at that December 15th meeting, even though you’re not going to be voting on it. Otherwise, you’re not going to have the opportunity, as the Commission, to take into account any of those comments if the regulations have changed.

COMMISSIONER CENTER: Our goal is to release them December 15th, and you’ll have 30 days to provide comment before we consider them at the January meeting.

MR. EWERT: I understand that. But at your January meeting, if you intend to vote on them at that time, any comments that someone may have that may result in a change to the regulation, you won’t be giving yourselves the opportunity to do so.

COMMISSIONER CENTER: We can amend at the meeting. But give us written comments as soon as possible, to the commissioners through Mr. Baron.

MR. EWERT: Okay. Can I also suggest that you utilize your Web site to post those?
COMMISSIONER CENTER: That’s our intention.

MR. EWERT: That would be great.

Thank you.

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

COMMISSIONER DOMBROWSKI: So moved.

COMMISSIONER CENTER: Second?

COMMISSIONER BROAD: Second.

COMMISSIONER CENTER: All in favor?

(Chorus of “ayes”)

COMMISSIONER CENTER: Opposed?

(No response)

COMMISSIONER CENTER: Motion is carried.

(Thereupon, at 3:16 p.m., the public meeting was adjourned.)
CERTIFICATE OF REPORTER/TRANSCRIBER

--o0o--

I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California, that I transcribed the four tapes recorded at the Public Meeting of the Industrial Welfare Commission, held on November 15, 1999, in San Francisco, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my abilities.

Dated: November 29, 1999

CYNTHIA M. JUDY
Reporter/Transcriber