PUBLIC MEETING

January 28, 2000
State Capitol, Room 4203
Sacramento, California
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Industrial Welfare Commission

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COMMISSIONER CENTER: Good morning, everyone.

Welcome to our January 28 Industrial Welfare Commission meeting.

I’d like to call the roll of the Commission -- excuse me -- call the Commission to order.

Our first order of business will be to swear in our new commissioner, Mr. Bosco.

MR. BARON: Raise your right hand.

(Thereupon, Executive Officer Baron administered the oath of office to Commissioner Bosco.)

MR. BARON: Welcome aboard.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER CENTER: Welcome and condolences, Doug.

(Laughter)

COMMISSIONER CENTER: With that, Andy, would you call the roll, please?

MR. BARON: Bosco.

COMMISSIONER BOSCO: Here.

MR. BARON: Broad.
COMMISSIONER BROAD: Here.

MR. BARON: Center.

COMMISSIONER CENTER: Here.

MR. BARON: Coleman.

COMMISSIONER COLEMAN: Here.

MR. BARON: Dombrowski.

COMMISSIONER DOMBROWSKI: Here.

COMMISSIONER CENTER: Thank you. It’s officially called to order.

First, a little housekeeping. We’re going to have as our first order of business the nurse practitioners, advanced nurse practitioners and midwives, and I’d like to limit that to one hour of testimony. And I believe some individuals submitted cards in order.

If you have a lead person for your organization, we’d like you to choose that person to come up first and testify. We’ll take the nurses that are supporting exemptions first, then the nurses that are opposing exemptions second, so we can -- and we’ll limit to 30 minutes on each side. And if we have additional time, other people can come forward. I’d like to have the spokesman be limited to five minutes for their testimony, and other individuals to three minutes.

And I want to avoid what we had in Los Angeles,
any commenting from the audience, outbreaks. Any
comments from the audience, we’ll consider that your
testimony in front of the Industrial Welfare Commission.
So, hopefully, we’ll limit that.
And Mr. Baron will be our timer up here, and
he’ll nudge me on the hip when it’s time to end your
testimony or wind it up.
First, I want to compliment Andy and the staff,
and Marguerite, for the amazing work trying to put these
regulations together and all the paperwork that has
floating into the office. I think Barry and I have even
commented, being labor individuals up here, a six-month
implementation time for this would have a little bit
easier for everybody, but that didn’t happen. So, we’re
under the gun to get it done.
We’ll take as long as we can today to get our
due process carried out.
After we do the nursing, then we’ll go into the
interim order and have testimony on that. And we’ll have
one industry rep and one labor rep come in and open it
up, and the time they take, then also limit the testimony
on the other individuals to three minutes on that. And
then we’ll see where we go.
With that -- with the advanced nurse
practitioners, do you have a spokesman who’d like to come up first, or do you want to go in order, or --

MS. MORROW: Should we all come up and sit?

COMMISSIONER CENTER: Yeah. And then -- yeah, the spokesman first, if you can. Then we’ll go off the order list.

Now, we have an individual spokesman you’ve chosen, or -- are you guys all going individually, or -- how are we doing this?

DR. SNELL: Well, we’ve all gone in order, and then people will be filling in.

COMMISSIONER CENTER: Well, unless you’re chosen a spokesman by your group, I’m going to go by the order of the cards that were submitted. That’s why I asked you --

DR. SNELL: Then I guess I’ll be the spokesperson.

COMMISSIONER CENTER: Okay. Then why don’t you be the spokesman? Thank you.

Then we’ll go in order, after you speak. So, you might have to get up and leave and let somebody else -- or make room.

DR. SNELL: Okay.

COMMISSIONER CENTER: Thank you.
DR. SNELL: My name is B. J. Snell. I’m a certified nurse midwife, and I’m here representing the California Nurse Midwives Association as well as advanced practice nurses, which we all are.

I welcome the opportunity to address this Commission again on behalf of the California Nurse Midwives Association regarding the implementation of AB 60. First of all, I would like to thank the chair, Chair Center, as well as the commissioners, and the very patient and informative staff of the Industrial Welfare Commission for their assistance and very professional approach to this discussion. In particular, I would like to point out the assistance of Michael Moreno, for his help and guidance. It has been absolutely marvelous.

The California Nurse Midwives Association is extremely concerned about the negative impact that this law has already had on the practice of nurse midwifery here in the State of California. I’d like to update the commissioners on events that have taken place to date, since the enactment of this law on January 1st, 2000.

A group of nurse midwives, originally four midwives, were effectively laid off of their jobs. Three were discharged completely, and one has retained work, only in the office on an 8-hour shift basis. These
layoffs were a direct result of AB 60. In their practice, they had contracted with women and families to provide midwifery model of care during pregnancy, labor, and birth. This model includes continuity of care from the beginning of labor through birth. Now these women, who sought and contracted for midwifery care, will not receive that care.

The one remaining midwife had her privileges for full-scope care changed immediately to eliminate night and weekend coverage because of the overtime requirements after 8 hours of work.

So, with the enactment of this law, three midwives with a very thriving practice in Central California are unemployed. One has had her practice severely restrained. And, more distressing, the women in their practice who sought out that care now have no choice.

Another large nurse midwifery service has been severely impacted by this new law. Prior to the enactment, the service covered the needs of their practice through 8-, 10-, 12-, and 24-hour blocks of time, and nurse midwifery providers were salaried employees. This gave the midwives the ability to be flexible and creative in their practice.
extended hours of care in order to accommodate needs of
working women and families. In addition, it allowed the
providers to attend the needs of women in a continuity
fashion during their labor and birth.

Prior to the new year, the nurse midwifery
service was counseled that there would be no further
schedules that included shifts beyond 8 to 12 hours. In
addition, the chief financial officer advised that the
budget had to remain neutral because of the large deficit
the facility was already facing due to the large indigent
population that this hospital serves. The consequences,
if the service desired 12-hour shifts, meant a reduction
in their base rate of pay in order to remain that budget
neutrality.

These changes have had monumental consequences
in this practice, from the professional restraint issues
to the personal distress. Physician employees that
perform the same job -- and they are employees -- for
comparable pay in the institution are exempted from this
law, as the same work does fit the professional category.

Also, in this facility as well as many, there
are employee midwives and there are independent
contractor midwives. This sets up a dual standard of
care and unfair competition.
It is perplexing to the California Nurse Midwives Association that comparable job descriptions for nurse midwives and physicians can be regulated differently because of the basic licensure of the individual. The basic licensure does not provide the legal authority to practice the profession of midwifery. Only with advanced certification by the state that permits the practice is midwifery allowed.

Regulation of midwifery practice under this law, with the current healthcare budgets, restrains the practice of our profession. Reduction in base rate of pay in order to remain budget neutrality impacts nurse midwives long-term differentially from their physician colleagues, especially in the area of retirement benefits.

Relief through an exemption that would provide for 12-hour days will not solve the dilemma for the nurse midwives, nor their patients in this state. As previously mentioned, the labor and birth process is unpredictable, and many times requires longer than 12 hours at a time. In order to perform our professional duties, nurse midwives must be exempt so they can remain in salaried positions and maintain their full scope of practice as allowed by law.
Healthcare is struggling to develop creative ways to provide quality and quantity professionals to meet the demands of the population with operating budgets that are very restricted. The two examples were provided in order to let the Commission know of how this law has already negatively impacted the professional practice of midwifery in the State of California. Many employers have contacted the CNMA to discuss their intentions to comply with the new law and make significant changes in the practice, unless relief is granted. This law provides only for one resource, and that is through this Commission.

We have provided information to you that outlines the education, standards, and credentials that are required for additional certification to practice as an advanced practice nurse. This information clearly demonstrates that we meet the requirements for exemption, in that we are engaged in work that is primarily intellectual, creative, and which exercises discretion and independent judgment, and we earn a monthly salary that is no less than at least twice the minimum wage within the state.

I am reminded, in closing, of a saying that I ran across a few weeks ago that I think is apropos. It
says, “Experience is a hard teacher: she gives the test first and the lessons afterwards.” We have taken the test and are now getting the lessons that go along with it. Hindsight is always 20-20.

This law has very good intentions and, I think, will protect a lot of workers in the state, and we’re certainly supportive of that. But we hope we can learn from the lessons that all does not fit one.

It is our hope that the commissioners take into account the major negative impact that this new law has created for our profession. The CNMA would seek the Commission to move to exempt nurse midwives from the requirements of AB 60 today, so that we may remain in salaried positions and practice as allowed by law. Your quick resolve will remedy the concerns of the profession before any further restrictions are placed.

We thank you again so much for your consideration and hope we will have a positive response or guidance from the Commission on a very quick resolution to this issue.

Thank you.

COMMISSIONER CENTER: Any questions?

COMMISSIONER BROAD: Do you have to be a registered nurse to be a nurse midwife?
DR. SNELL: You do not have to be a registered nurse to be a midwife in the State of California. There are two pathways for midwifery in the State of California.

COMMISSIONER BROAD: Would you explain that?

DR. SNELL: One path is that you are a registered nurse initially, and then go to a school that requires you to be a registered nurse in order to gain the education and credentials as a midwife. The other pathway is that you do not have to be a nurse, and you go to a school that prepares you to be a midwife, and then you are licensed through an agency other than the Board of Registered Nursing.

COMMISSIONER BROAD: Okay. Now, my other question is, are other advanced practice nurses in the other categories, other than midwifery, are they required to be registered nurses?

DR. SNELL: Yes. Yes, they are.

COMMISSIONER BROAD: Okay. Have you sought any -- and this is respect -- there’s obviously a clear distinction here between midwives and other advanced practice nurses -- in the operative place in the statute, it says, “In addition to the requirements of subdivision
(a), registered nurses employed to engage in the
practice of nursing shall not be exempted from
coverage under any part of the orders of the
Industrial Welfare Commission.”

It’s very succinct language.

Have you sought any guidance from the Labor
Commissioner as to whether midwives are “registered
nurses employed to engage in the practice of nursing”?

DR. SNELL: We have not.

COMMISSIONER BROAD: I would suggest that you
seek that guidance, because it seems to me that the
statute is very clear and unambiguous. And with respect
to your group, it may be that they are not “engaged in
the practice” -- they are not “employed to engage in the
practice of nursing,” because people in that licensed
category do not have to be registered nurses in order to
engage in that occupation. And it would seem to be that
before you come to the Commission and ask for an
exemption, you might clarify whether the Labor
Commissioner believes, at this point, that midwives fall
outside of this statutory requirement.

DR. SNELL: And therefore would then be exempt?

COMMISSIONER BROAD: Yes.

DR. SNELL: They would fall, then, into the
professional category? Is that --

COMMISSIONER BROAD: Well, they would not be prohibited from exemption by that section. They would still, as you pointed out, have to meet the other standards; that is, that they’re engaged in a certain kind of work and that they meet the salary test and that they’re primarily engaged in that work, and so forth that’s all -- in the other part of the section, but that they are not prohibited from being exempted based on Section 515(f) of the Labor Code.

DR. SNELL: And if I may ask a question back, if, in fact, that we do approach the Labor Commissioner with that, is that something that is likely to be a very quick remedy? Because as we -- as I provided in the testimony, these things have already taken effect. And unless these particular places get something official very quickly, the nurse midwives that have already been laid off will not be reinstated, and the nurse midwives that are in the large system that has been changed dramatically will not change right away. And these patients are the ones that we are concerned about.

COMMISSIONER BROAD: I understand your question. I don’t know, as an individual commissioner, how quickly they respond to these opinion letters, although you could
have asked for this opinion letter at any time since the
passage of AB 60, which was, you know, eight months ago.
But there are representatives, I believe, of the Labor
Commissioner’s Office in attendance here, and you can
simply ask the question, what the turnaround time is.
But I believe that that would be, at this juncture, the
appropriate path for you to go on this issue. It might
very well resolve the issue, at least for that group, one
way or the other. And then, if you still feel aggrieved,
you can always return to the Commission and petition for
whatever relief is appropriate in your opinion.

DR. SNELL: Thank you.

COMMISSIONER CENTER: Thank you.

Now are we having individual, groups or -- are
we individuals now? It’s now another group?

MS. MORROW: Um-hmm.

COMMISSIONER CENTER: Which group are you --

MS. MORROW: Well, actually, we have three
groups represented here, and myself and Susie Phillips,
on the end, are from the California Coalition of Nurse
Practitioners.

COMMISSIONER CENTER: Okay. And you’re with --

MS. HAIGHT: And I’m Deborah Haight, from the
Nurse Anesthetists.
COMMISSIONER CENTER: Okay. Why don’t we have extended testimony from one of yours, and then you. Let’s keep this to five minutes, if we can.

MS. MORROW: Okay.

Do you want to go first?

MS. PHILLIPS: Uh-huh, sure.

Chairman Center and commissioners, my name is Susanne Phillips, and I’m a practicing nurse practitioner in the State of California. I would like to thank you all for hearing our testimony this morning and for the hard work that you’ve already put into this thus far. We very much appreciate that.

If AB 60 is implemented without an exemption for advanced practice nurses, many nurse practitioners in the State of California will lose their jobs to healthcare providers such as physicians and physician assistants, who are covered or may be covered under the professional exemption.

Nurse practitioners work in a variety of settings, which you may know, many of whom are employees in hospitals and healthcare organizations. The majority of nurse practitioners work in primary care, such as adults, family, women’s health, and pediatric. They see scheduled patients, carry pagers for after-hours calls,
attend to emergencies after hours. There are other nurse practitioners in sub-specialties such as neonatal nurse practitioners, who provide 24-hour coverage in-house to critically ill premature infants. They assess, diagnose, write orders for treatment of these critically ill infants, and work much in the same capacity as the residents and physicians in these -- in these intensive care units. Similarly, acute care nurse practitioners also provide 12- to 24-hour coverage in intensive care units for the adults and also emergency departments. They work in the same role as the staff physicians and residents as well.

The responsibilities of the nurse practitioner, regardless of the specialty, are above and beyond those of a registered nurse. As you can see, the scope of practice and responsibility extend way beyond the 8-hour day.

Similar to physician and nurse midwife services, nurse practitioners services are a mandated service available to California residents, under the rules and regulations of the Health Care Financing Administration. MediCal regulations require that those covered by MediCal have access to nurse practitioner services. Inasmuch as each of these services overlap, we should all be included
in this professional exemption.

In conclusion, nurse practitioners are licensed as registered nurses; that is correct. But we have advanced education and training beyond that of a staff registered nurse. By definition, nurse practitioners clearly function as healthcare professionals who also engage in work that is primarily intellectual and creative and requires the exercise of discretion and independent judgment that is required of an exempt employee. To implement AB 60 without exemption for advanced practice nurses would prohibit nurse practitioners from providing the quality care they provide to the patient populations they see and would effectively replace us by other healthcare providers who are considered exempt.

Thank you very much.

COMMISSIONER CENTER: Thank you.

MS. HAIGHT: I’m Deborah Haight. I’m the president of the California Association of Nurse Anesthetists, and I’m also a practicing nurse anesthetist.

We also appreciate that all of you have a challenging, complicated task of implementing AB 60, and we thank you and your staff for the time and attention
that you’ve already given us as we have talked about the
need of advanced practice nurses to have the ability to
have the professional exemption. As you go through the
process of looking especially at the California
healthcare industry, we appreciate being one of the first
ones able to talk to you about our problems.

We need your help. Nurse anesthetists are used
interchangeably with physician anesthesiologists. We are
able to do pre- and post-op, pre-anesthetic evaluations,
post-op anesthetic evaluations, choose the anesthesia
agents that we use, choose the -- work with the surgeons
for all kinds of cases, giving all kinds of anesthetics.
We -- our physician colleagues, the anesthesiologists,
are exempt as professionals. We compete directly with
them, and we also work with them. And having them able
to have this professional exemption and not our -- the
nurse anesthetists puts us at a devastating disadvantage.
And it’s definitely a restraint of trade.

I happen to work for a group in northern
California of about 180 -- that employs 180 nurse
anesthetists, and we, in lieu of overtime in the last few
years, had our base pay increased; our vacation time was
worth more, educational leave, our sick time. When we go
to get loans for our houses and cars, our base salary is
higher and worth more, and we’re able to take care of our families better. To have -- our retirement is also worth more.

To now be placed in a non-exempt position means that we lose more base pay, more retirement benefits. The very law that is supposed to protect and help California workers actually turns out to cause our livelihood to decrease, but also is devastating for our practice in California.

We appreciate your time and attention and look forward to working with you further on this issue.

COMMISSIONER CENTER: Thank you.

What I’d like to do now is bring up the side that is opposing the exemption, then go to the individual nurses’ testimony, if we could.

Is there anybody that’s in opposition now to these proposed exemptions, or is there testimony? Do we have anybody from the other side?

(No response)

COMMISSIONER CENTER: I guess we’re just going to go through names, then.

I have -- and please, if you have anything to add, add, but if it’s similar testimony, you can just state your name and give your position and make it a
little bit faster. We’d appreciate that.

I have Deborah Gribbons.

MS. GRIBBONS: That’s me.

COMMISSIONER CENTER: Okay.

MS. GRIBBONS: Good morning. Good morning, Mr. Center and colleagues. Thank you so much for the opportunity to hear my concerns about AB 60 and how it adversely affects advanced practice nurses. My name is Debbie Harris, and I work at Children’s Hospital, Los Angeles, as an advanced practice nurse, specifically as a pediatric nurse practitioner in the Division of Hematology/ Oncology. I have a master’s degree and am nationally certified as a pediatric nurse practitioner.

As an advanced practice nurse, I want professional exemption from state wage and hour laws. As my colleagues said, advanced practice nursing jobs are fundamentally different from staff nurse roles. The California Nurse Practice Act identifies four areas of advanced practice nurses: specifically, the pediatric nurse practitioner, certified registered nurse anesthetist, certified nurse midwife, and the clinical nurse specialist. As a group, we are all registered -- we are all registered nurses. That’s our base education.

From that point, additional education and training was
obtained in subspecialized areas. We generally hold advanced degrees, masters or doctorates in nursing. Most of us also hold state or national certification in our areas of subspecialty.

Advanced practice nurses’ jobs differ from that of a bedside nurse. For example, I independently see children with blood diseases in my clinic. I perform physical exams, interpret lab and diagnostic tests, diagnose illness, and formulate treatment plans. The bedside nurse carries out my orders.

I have a furnishing license granted by the State of California that enables me to order medications, including narcotics. I have applied for a DEA number. This advanced function of ordering narcotics is very important to my practice. I take care of children who have sickle cell disease, and pain is the hallmark of their disease. Thus, prompt assessment and intervention, including pain medications, ordering of narcotics, is very important for my job. The bedside nurse can administer the pain medications that I’ve ordered.

So, as you can see, my scope of practice differs greatly from that of a bedside nurse.

Patient problems don’t arise within an 8-hour shifts. When my patients suffer strokes, severe painful
events, or lung infarction, I don’t look at my watch and
decide if I can take care of them. I need flexible hours
of employment that will allow me the ability to apply my
specialized training and knowledge to my clinical
practice as the need arises. If I can’t do this, my
patient care will suffer and my job satisfaction will
spiral downwards.

Just as my physician colleagues can’t close shop
and stop treating patients at a designated time, I can’t
do this either. I cannot work as an advanced practice
nurse on a shift basis.

Nurse practitioners have a record of excellence
for patient safety, quality of care, acceptance by
patients and physicians, and cost-effectiveness. To
demonstrate that, I previously submitted an article,
written by Mundinger and colleagues that was published in
the *Journal of the American Medical Association* this
month, looking at primary care outcomes in patients
treated by nurse practitioners and physicians. At first,
what I heard -- yes?

Okay. Thank you.

In closing, a nurse is not a nurse is not a
nurse. There are differences between the role of an
advanced practice nurse and a bedside nurse. I hope that
you, Mr. Center and colleagues, will understand these
differences and realize that the same legislation, AB 60,
should not be applied as an umbrella to all RNs. I urge
you to interpret AB 60 to exclude advanced practice
nurses.

Thank you very much, Mr. Center and colleagues.

COMMISSIONER CENTER: Thank you.

Noreen Clarke-Sheehan?

MS. CLARKE-SHEEHAN: Good morning.

COMMISSIONER CENTER: Good morning.

MS. CLARKE-SHEEHAN: Thank you for the

opportunity to speak to you.

I am an advanced practice nurse and have my
master’s degree in family nursing. I am specialized in
the care of children with cranial, facial, and cleft
anomalies. The care of these children requires a multi-
disciplinary approach. I’ve served for the past several
years as both the coordinator for this team and the
clinical nurse specialist on the team. I find my work
very rewarding and intellectually stimulating. I enjoy
following the children and their family along the
continuum of care, which usually extends into young
adulthood.

As an advanced practice nurse, I have
responsibility for the patients over the duration of
their treatment plan, not just at any one point in time.
I provide essential continuity of care across many
settings. I have the pleasure to participate and to
watch the children with facial differences go from the
crisis of a birth with a deformity to becoming a fully
participating member of society.

My job as an APN requires that I work 10 hours
on some days and 6 hours on another day. The loss of the
exemption eliminates my job flexibility. I want and need
this flexibility.

As a working mother of two children, this
flexibility has enabled me to remain in the workforce. I
can and do adjust my hours to meet both the needs of my
personal families and the families which I service. I
feel I am better able to provide family-centered care by
being flexible.

For California, this means decreased ability to
recruit and retain expert nurses. If these professionals
don’t choose to work in California under the new law,
advanced practice nurses will have limited ability to
teach classes, lecture at meetings, or conduct research
to improve care. Professional autonomy and
responsibility require flexibility.
I would like to give an example of one of the facets of my role as an advanced practice nurse and how AB 60 will impact my practice. Each day in California, at least one infant is born with a facial cleft. No one was planning for this deformity, no one expected it. Rather than a blessing, this birth becomes a crisis for the family. The baby looks very different. He cannot eat as normal babies do. All the expectations that families have had in planning for this baby have been disrupted. Intervention at this point is essential. I help the family get through this crisis by educating them on how to feed their child with a cleft and the surgical timing and care needs for their child. This establishes me as the professional who will help guide them through the future care of their child. This early intervention is fundamental in establishing a relationship for the long-term care that lies ahead.

AB 60 denies me the flexibility to respond to these families at the time of the initial crisis. Babies are generally not born Monday through Friday, 8 to 4:30.

The essence of advanced practice nursing is professional autonomy, accountability, and flexibility to meet patient and family needs when they occur. But in the language of AB 60, California now considers these
essential professionals as individuals who do work that is not primarily autonomous, intellectual, or creative.

The State of California has decided that advanced practice nurses do work that doesn’t require the exercise of discretion and independent judgment. I do not believe it was the intent of AB 60 to deprofessionalize advanced practice nurses.

I trust that you and the members of the IWC will give this issue serious consideration as you consider the impact of AB 60 on my practice.

COMMISSIONER CENTER: Thank you.

Karen Snow.

MS. SNOW-RODRIGUEZ: Yes. Good morning.

COMMISSIONER CENTER: Good morning.

MS. SNOW-RODRIGUEZ: Thank you for your time. I will try and make this brief.

The elimination of exemption for advanced practice nurses threatens our individual jobs and our careers collectively, as you have already heard.

I work at Children’s Hospital, Los Angeles, and I am an advanced practice nurse working in the role as a pediatric nurse practitioner in the Department of Pediatric Surgery. I have a master’s degree in nursing, and I am also nationally certified.
At CHLA, advanced practice nurses are specialist clinical practitioners. We do physician-type work. Physician assistants, who are used similarly at Children’s, remain exempt. Advanced practice nurses at my hospital are well compensated as exempt employees. Our compensation is at the same level as nursing management.

As mentioned previously, our jobs are not confined to 8-hour shifts. If the hospital has to pay us overtime, they will stop using advanced practice nurses, and we will use -- and they will be forced or choose to use exempted physician assistants. My employer will use a physician assistant who is not a registered nurse. Even if there are not enough physician assistants to replace APNs, hospitals such as mine cannot afford to pay us our overtime. They will be forced to cut back advanced practice nursing hours, which will be detrimental to the care of our patients. This law eliminates my ability to carry the pride of my advanced nursing education.

Just a personal example of my day is, on a given day, I am available to approximately seven to ten surgical services, approximately twenty to thirty surgeons and physicians, and their patients and families,
to answer questions regarding surgical preparation, pre-
operative, inter-operative, post-operative care. These
questions and consultations do not come to me on an 8-
hour -- in an 8-hour day. This is ongoing work that I am
responsible for on a 24-hour basis.

My advanced practice colleagues and I will be
out of a job, and our career opportunities are going to
evaporate. This law will eliminate my ability to provide
a living for my family. And I hope that you would take a
strong look at this.

Thank you.

COMMISSIONER CENTER: Thank you.

Donna Nowicki.

MS. NOWICKI: Yes. I’m Donna Nowicki,
Children’s Hospital, Los Angeles. I’m an advanced
practice nurse, specifically a nurse practitioner. My
subspecialty is pediatric surgery.

And certainly, I’m not going to repeat
everything my colleagues so eloquently said; I’m just
going to give a personal testimony.

In my specialty, I manage a group of pediatric
surgical patients. I see them in my clinic, I see them
in the emergency room. When they’re ill, I admit them to
the hospital. While in the hospital, I do manage their
care. I write all their laboratory and X-ray orders. If they need to go to the operating room, I can accompany them to the operating room and oftentimes will assist the surgeon in their surgeries. When they’re well, I discharge them from the hospital. I’m also an available consultant for other clinics and, as I mentioned before, the emergency room.

I’m these children’s health provider. That’s what they know me as. And as an example of this, over the holidays one of my patients was vacationing in Italy. And at three o’clock in the morning, I got a phone call from a surgeon in a Rome hospital requesting medical information for the patient. The mother had given him my card. At first he had been insistent on speaking to a surgeon, but this mother was equally as insistent that he speak to me. She told him that I was the one that knew her patient -- her child better than anybody else.

It’s clear that we have been accepted as health providers in this country, and that’s slowly starting to spread throughout the world.

As many here are, I am considered an expert in my field. I lecture nationally and internationally. I have published -- I have a chapter coming out next month. I’m also involved in research studies. To strip me of my
professional status and put me as an hourly employee is quite the hardship. And in my twenty years as a nurse practitioner, I certainly have seen obstacles, and we’ve hurdled some of those obstacles. But this, by far, is one of the darkest moments that we’re seeing as advanced practices nurses in this state. And certainly, you don’t want to chase us out to other states where we’re accepted as professionals.

So, again, I will ask for professional exemption for advanced practice nurses, our nurse midwives, nurse practitioners, clinical nurse specialists, and nurse anesthetists.

Thank you very much.

COMMISSIONER CENTER: Thank you.

I had -- did Jeanette Mason sign in with a card?

You signed in with a card?

MS. MASON: Yes.

COMMISSIONER CENTER: One of these cards too?

MS. MASON: Yes.

COMMISSIONER CENTER: Well, I didn’t see your name in here. Your card was on my podium.

Would you like to come up, ma’am?

MS. MASON: Yeah.

COMMISSIONER CENTER: I didn’t get a card from
you.

Oh, I’m sorry. Are you --

MS. MORROW: I’m a Jeanette also.

COMMISSIONER CENTER: Jeanette --

MS. MORROW: Morrow.

COMMISSIONER CENTER: Jeanette Morrow.

Go ahead, Jeanette, first.

MS. MORROW: Thank you.

COMMISSIONER CENTER: We have the other Jeanette.

MS. MORROW: I’m actually giving individual testimony. And I’m a nurse practitioner also. I think we’ve been very well represented here. I work in the emergency room at Mercy General Hospital, which is just down the street. So, if any of you get the flu, you may be seeing me.

(Laughter)

MS. MORROW: I’ve been seeing a lot of people with the flu.

When patients come into the emergency room, they are triaged, and they either go to the emergency room or to the clinic. They see either a doctor or the nurse practitioner. And I’m very well qualified to take their history, do their physical exam, order their lab tests,
their X-rays, giving them breathing treatments, treat the flu. A lot of people have needed intravenous fluids, they’ve needed breathing treatments, all kinds of symptomatic treatment to help them get over the virus. And those are the kind of things that nurse practitioners do.

I consider myself a professional, as does my employer. The nurse practitioners are included in the professional staff. We attend the core meetings at which decisions are made on our practice and the practice of the emergency room, we also have the same benefits as the physicians, we’re included in the physician retreat. And we also compete with physician assistants. My employer also employs physician assistants, who will be professionally exempt. And so, I feel like my job is in jeopardy as well.

And I’m just trying to reiterate what other people have said about status as professionals and our desire for professional exemption.

Thank you.

COMMISSIONER CENTER: Thank you.

I’m sorry. We’re strictly on advanced practice nurses.

MS. MASON: A near miss.
COMMISSIONER CENTER: Yeah.

Let’s see. Susanne Phillips.

MS. PHILLIPS: I’ve already talked.

COMMISSIONER CENTER: Okay. Sorry.

Jeanette Morrow.

MR. BARON: She just spoke.

COMMISSIONER CENTER: I’m not doing very well now.

B. J. Snell.

MR. BARON: She spoke.

COMMISSIONER CENTER: She spoke.

Arlene Sheehan.

MR. BARON: She spoke too.

Patricia Pratoomratana. I think I destroyed your name. Sorry.

MS. SHEEHAN: Good morning. My name is Arlene Sheehan. I’m a neonatal nurse practitioner. I don’t think you’ve heard from one of us yet. I represent nine neonatal nurse practitioners at Packard Children’s Hospital at Stanford, a number of whom are here with me today, to hope to convince you to exempt us from the provisions of AB 60.

I’d like to take this opportunity to demonstrate why I think our group should be exempted under the
professional exemption, and I thought I would just give you an idea of what we do, since you probably don’t know. And I think it will become apparent to you that we are professionals and should be exempted.

We work 12- to 24-hour shifts at Stanford in the intensive care unit. That’s the newborn intensive care unit. We work alongside a team of two to three physicians. We work the same shifts as the physicians and, in fact, do the same job. On a typical shift, the last shift I worked, I was called to the delivery room to attend the delivery of a 29-week gestational age infant, born very prematurely, born with a low heart rate, a low respiratory rate. I was the person in attendance at the delivery; I was not there with a physician. I placed an endotrachial tube, I provided assisted ventilation. I brought the baby back to the newborn intensive care unit, where I placed lines, ordered respiratory treatments, ordered medications, supported the baby in whatever way it was necessary, ordered X-rays, interpreted labs, and then contacted my attending physician to continue providing that kind of level of care for this baby.

As you can see, neonatal nurse practitioners do not provide nursing care. What we do is we direct nursing care. We’re able to do that because of advanced
studies. I personally have three years of master’s level preparation. I’m also certified in the State of California, I passed a certification exam, as did my nine colleagues.

Should this Commission decide not to exempt us from AB 60 and force us to work 8-hour shifts, we would be providing very fragmented care. We could no longer work alongside our physician colleagues who work 12- to 24-hour shifts. We’d be coming and going at very odd hours of days. We wouldn’t be able to accept report on these patients, as we’re currently available to do.

We could not expect the hospital to pay us the overtime to work 10-, 12-, and 24-hour shifts; it’s just not financially feasible. So, I think it would force the hospital to look for healthcare providers who are exempted from AB 60, for instance, physicians, to replace us. It is our understanding that the Commission is attempting to protect workers from long overtime hours, but I think, in fact, AB 60 will have the opposite effect and may actually lead to the destruction of the profession of neonatal nurse practitioners if we’re forced to work 8-hour shifts.

Thank you.

COMMISSIONER CENTER: Thank you.
Patricia, I’ll let you state your last name.

MS. PRATOOMRATANA: Hi. My name is Patrice, first. My last name is Pratoomratana. That’s okay. I’m used to my name not being pronounced properly.

I am a respiratory therapist, but I’m here on behalf of the hospital I work with in northern California, a very small hospital, speaking on behalf of all 12-hour-shift workers in our hospital.

I’m not going to get into the specifics of my job. Just basically, as I’ve heard from a lot of other people, hospitals can’t afford to pay the time and a half. And if the staff chooses to stay on 12-hour shifts, I think we should have that option. I don’t feel very comfortable being forced to do certain things, and this law is forcing certain hospitals to make their staff go back to 8-hour shifts. And it’s not feasible, it’s not good for the patients.

When you work with life and death every day, you need at least a couple days more than one or two days off here and there, just to regroup, just to mentally get ready to go back to work and deal with life and sickness every day. And that’s going to limit us -- we’re not going to be able to do that any more.

COMMISSIONER CENTER: Excuse me. Are you an
advanced practitioner nurse?

MS. PRATOOMRATANA: I’m a respiratory therapist.

COMMISSIONER CENTER: But are you an advanced practitioner nurse?

MS. PRATOOMRATANA: No.

COMMISSIONER CENTER: Okay. We’re only taking testimony on that issue right now. We’ll take testimony on the healthcare industry when we go on to the order.

MS. PRATOOMRATANA: Okay.

COMMISSIONER CENTER: Because there’s other people that want to testify, and we’re limited to one hour here.

MS. PRATOOMRATANA: Okay. Well, I was chosen as a group to speak for the nurses and pretty much the whole --

COMMISSIONER CENTER: For the -- of the advanced practitioner nurses?

MS. PRATOOMRATANA: Right. Right. That -- I was chosen to speak, so I thought, since we do the same thing and work the same hours, we are both affected the same way.

COMMISSIONER CENTER: But that -- in reference to the healthcare industry, we’re going to go into that after eleven o’clock. I just don’t want to take somebody
else’s time that is directly affected by the professional exemption.

MS. PRATOOMRATANA: Okay.

COMMISSIONER CENTER: That’s what we’re talking about right now. And we’ll do that, please.

MS. PRATOOMRATANA: Okay.

COMMISSIONER CENTER: And we’ll bring it up in the other session.

So, I have some people -- I have Tricia Hunter.

COMMISSIONER CENTER: Are they sending cards?

MS. HUNTER: I’m Tricia Hunter. I’m the legislative advocate for the American Nurses Association in California. And I appreciate the time the commissioners and the Commission has taken on trying to deal with this issue.

The points, I guess, I want to stress the most is that there are advanced practice nurses out there that are losing their jobs because of this exemption. I would hope that, as we go through the process -- and we will write the letter, as directed, to the Labor Commissioner -- there are -- these are positions that, even though nursing may have been how they got there, the positions are very definitely beyond the basic practice of a registered nurse. A midwife, you can get there two
routes, as was described. A nurse anesthetist literally steps in for an anesthesiologist and does the same duties. I, as a registered nurse, cannot do what a nurse anesthetist does, within my license. It is beyond the basic license of a registered nurse, as they do. And then again, a nurse practitioner works in private practice.

The ramifications of AB 60 go well beyond the hospital. It is nurses who are in collaborative practice, that receive a salary from a physician, are now put in a position that that collaborative practice is in jeopardy. It's nurses who join practices of other healthcare practitioners to provide services like anesthesia, who, because they, in the past, have received a salary, are now in jeopardy because it’s going to be required that receive an 8-hour.

It is a critical issue for nursing. It does take us back a long way in the battles that we have fought to bring professional nursing, and in particular, advanced practice nursing, to the forefront as providers in the State of California. And we appreciate anything you can do in helping us resolve this issue.

COMMISSIONER CENTER: Thank you.

I understand some people that are in opposition
have arrived. Could you please come up and state your name?

And I explained, prior to your arriving, we’d like to have one person to be the primary spokesman and limit the testimony of the other person, and we’re running -- and so, we’re -- I don’t know who you choose as your spokesman,

but --

MS. BRODERSON: Well, we’re all three speaking separately.

COMMISSIONER CENTER: Okay.

MS. BLAKE: It’ll be brief. We’ll be brief.

MS. BRODERSON: We’ll be very brief.

MS. BLAKE: Okay.

MS. BRODERSON: All right. I’ll go ahead and go first. My name is Pamela Broderson. I’m an OB-GYN nurse practitioner. I work in southern California for Kaiser Permanente.

I’m here today representing over 400 registered nurse practitioners who work for Southern California Permanente Medical Group. As an advanced practice RNP, I believe it is a disadvantage to our group to be exempt from overtime. The profile of my day is not made up by me, but rather, by some of the least educated individuals
in the healthcare structure, the appointment clerks. I, along with my advanced practice colleagues, have appointment slots designated for physical exams, return appointments, GYN slots, OBs, et cetera, and there is no penalty, in the form of overtime by my employer, for days that exceed 8 hours if there is an exemption to overtime for nurse practitioners.

The benchmarks of patients that I see will certainly accelerate, and there will be absolutely no accountability for how many in a day that I will be -- I will be designated to see. My colleagues and I strongly oppose an exemption to the overtime for the advanced practice nurse practitioner.

I also would like to say that as an employee of Southern California Permanente Medical Group, I do not have the same benefits as physicians. Yes, our accountability is the same to the patients, but wages, benefits, and autonomy is clearly different.

I believe also that it is a health and safety issue, not only to the patients we care for, but for the licensure that we hold. So, my voice is strong opposition to an exemption to AB 60.

COMMISSIONER CENTER: Thank you.

MS. BLAKE: My name is Barbara Blake. I'm the
state secretary for United Nurses Associations of California. We represent 10,000 RNs, advanced practice nurses, in southern California. We feel very strongly that the RNP should not be exempt, but we think that you may want to look at the midwives being carved out from that group and being allowed to be exempt. Under the BRN, the advanced practice nurses all hold separate certifications, the public health nurses, the psychiatric mental health nurses, the nurse anesthetists, the RNPs, and the nurse midwives all hold different certifications under the Board. So, we believe that you should carve out nurse midwives if they’re practicing more nurse -- or they’re practicing midwifery rather than nursing, and that you may want to look at them as a special category.

I understand, on working with them, that they feel strongly that they should be exempt from this. On the other hand, the RNPs that we represent, we have done a survey of those RNPs, and the overwhelming majority of those nurses and -- or advanced practice nurses -- felt that they should be left as nonexempt employees. So, we would ask you to look at the certifications under the advanced practice in different categories.

COMMISSIONER CENTER: Thank you.

MS. MILLER: Hello. My name is Vivian Miller,
and I’m a nurse practitioner with a master’s. I work for Kaiser, Panorama City, in internal medicine and rheumatology. I’m also the clinic vice president for UNAC.

The nurses I work with, the nurse practitioners I work with, all agree with this statement: We support AB 60 as it’s written. We believe that without AB 60, the employers will have the upper hand and be able to dictate unlimited hours without adequate pay.

I think the pay should be equivalent to the hours you work. And if not paid on hours worked, it’ll allow management the ability to adjust our schedules to their advantage. For example, in 1992 when I started as a nurse practitioner in internal medicine, I was given 45 minutes for a physical exam. That’s been cut to 30 minutes, and within this last year, it was cut to 20 minutes. If this law is changed, there’s going to be nothing to prevent the administration or managers from continuing to decrease this amount of time to, eventually -- what? -- 10 minutes for a physical exam? We’d all be working overtime on a daily basis without any monetary reimbursement for that additional time.

I don’t think we can allow our employers to overburden us with unrealistic expectations, which is
what I think will happen if this law is -- if we’re exempt.

I think eliminating this law is just a deterrent for managers to give us more work without adequate compensation. And advanced nurse practice nurses do not want to be exempt from these rules.

I believe there’s a lot been said about professionalism, and I think that all advanced practice nurses are professionals. And I don’t think being paid an hourly salary diminishes that title of professional. Compensation for hours worked doesn’t impact our profession.

We can support the midwives wanting to work overtime, if that’s their choice. I think they need to realize, though, that the management may have the upper hand with them also in this type of practice, and they may be working longer hours than they expected to be working on straight time.

We cannot support -- what we can’t support is an across-the-board change in this law that would eliminate the overtime of advanced practice nurse practitioners. Again, we do not want to be an exempt category. We want to be paid for each and every hour we work.

I urge you not to eliminate the overtime for
nurse practitioners.

COMMISSIONER CENTER: Thank you.

MS. BLAKE: And let me clarify, because we came in your late --

COMMISSIONER CENTER: Yeah.

MS. BLAKE: -- your lovely fog in Sacramento. You’re taking testimony on the rest of AB 60 and the alternative work schedules later?

COMMISSIONER CENTER: Correct.

MS. BLAKE: So, we have submitted cards. You’ll return those to the staff?

COMMISSIONER CENTER: Yes.

MS. BLAKE: Okay.

MS. BRODERSON: Before I leave, I’d also like to leave some letters from some of my colleague nurse practitioners who also oppose AB 60 with the clerk.

COMMISSIONER CENTER: Thank you.

I have Diane Fletcher.

MS. FLETCHER: Hi. My name is Diane Fletcher. I’m a nurse practitioner here in Sacramento with the med clinic affiliated with the Mercy organization. I work in an internal medicine department, and I support being a nonexempt employee.

The one thing I wanted to bring to this
committee today is my concern about the overtime. Though I think we deserve it, we are also in a competitive market with physician assistants. So, we do the same job. So, if we’re going to be paid overtime, we have to also look at categorizing the physician assistants as professionals, because when we go for jobs in private practice or in organizations like the med clinic, if they can hire a PA who is going to be an exempt employee and be in a position to hire us as a nonexempt, then our marketability and our ability for retention in organizations might be jeopardized.

So, that’s the only point I really wanted to make.

Thank you.

COMMISSIONER CENTER: Thank you.
Any other testimony on this issue?
PROFESSOR LYNCH: Yes. My name is Mary Lynch. My card was there. I guess it got lost.
I’m a professor at the University of California, San Francisco, and I represent the faculty from the number one school in the nation to say that we are thrilled that you can now use the words “advanced practice nurse.” However, what you do need is some clarity on the key roles that advanced practice nurses
play in California.

Currently, nurse practitioners, and many other forms of advanced practice nurses, are filling the key gaps for medically under-served communities in the State of California. At a time where, nationally, we are very seriously concerned about the issue of medical errors, I can guarantee that if you do not support the exemption for advanced practice nurses, that you will be playing a role in enhancing and increasing the number of medical errors that occur in institutions in the State of California.

And I’ll gladly give you an example of how that can occur. Most of the nurse practitioners that have been here today have already spoken eloquently about the issues, particularly for pregnant women and for sick infants and children, and why pregnant women don’t have their babies on 8-hour schedules, and why extremely ill infants and children don’t automatically get better over an 8-hour period.

Institutions have hired physicians, hundreds of physicians, within the State of California to work in intensive care units long hours. They have no specific hourly requirement. Now, on the alternative, nurse practitioners and advanced practice nurses, as employees,
are hired on, in many cases, 12- and 18-hour shifts, so that they work in the same roles as their physician colleagues.

As a faculty member and as a member in the State of California, I am required to help educate the nurse practitioner students, to help them see that they are different than nurses. They have a higher level of practice, they are required to have the same credentialing as physicians, they are held to the exact same scrutiny, both legal scrutiny and professional scrutiny. For you to pull out this group of individuals who are key providers for all of us in the State of California will cause, I believe, many of the voters who put you in these positions to be extremely concerned about your judgment.

Thank you.

COMMISSIONER CENTER: Thank you.

(Applause)

COMMISSIONER CENTER: Any comments from the Commission?

(No response)

(Laughter)

COMMISSIONER CENTER: Do you volunteer to be removed?
(Laughter)

COMMISSIONER CENTER: Oh, excuse me. Sorry.

MS. BAIR: Good morning. Thank you for the opportunity to speak. My name is Ellen Bair, and I’m a pediatric nurse practitioner practicing at the Lucile Packard Children’s Hospital at Stanford. I have been a pediatric nurse practitioner in the State of California for twenty years, and I practice in the pediatric otolaryngology -- better known “ENT” practice -- for children at Stanford.

I strongly support leaving advanced practice nurses in the exempt position and would urge you to take a look at the testimony presented this morning to leave us in the exempt position. I think my colleagues have done a great job in representing the issues to leave us exempt.

Thank you.

COMMISSIONER CENTER: Thank you.

Then, with no motions, this will conclude our hearing on the advanced practice nurses, informational hearing.

A suggestion is -- we’re going to go into -- since I don’t see any motions coming from the Commission -- is we’re going to go into another hearing on the
definition of “primarily” and “managerial,” and I’d like to hear in that hearing from the licensing body for the nurses for the definition, for them, as to what your duties are.

And with the nurse midwife practitioners, Miles Locker is over here. I think you should get together with him today and submit that letter, because I think you have a compelling argument for an exemption since you don’t have to be required to be a nurse to be a licensed midwife.

And with that, I’d like to go into the hearing on the interim order and set the same parameters. We’re going to have a speaker from industry, one from labor, then we’ll go to individual testimony, by industries.

Our first speaker will be Julianne Broyles.

MS. BROYLES: Good morning, Mr. Commissioner, commissioners. This is -- I’m Julianne Broyles, from the California Chamber of Commerce. Thank you for the opportunity to be here today.

I am testifying today on behalf of both the California Chamber of Commerce and the following organizations, who are members of the California Employers Coalition: the American Electronics Association, Associated Builders and Contractors of
California, the California Association of Health Services at Home, the California Association of Employers, the California Business Properties Association, the California Grocers Association, California Manufacturing Association, the California Newspaper Publishers Association, the California Taxpayers Association, the California Hotel and Motel Association, the Consulting Engineers and Land Surveyors of California, the Lumber Association of California and Nevada, the Printing Industry Associations of California, Semper Energy, and the Trade Contractor Alliance of Orange County.

We are appearing here today in response to the notice of public hearing regarding the draft interim wage order that will implement the provisions of Assembly Bill 60, the Eight-Hour Overtime Restoration and Workplace Flexibility Act of 1999.

We have a number of issues that are technical in nature, and I will try not to dwell too long on any one of those, but in general, certainly, that California employers and their employees need wage orders that are easy to understand, wage orders that provide flexibility in the choice of schedules to both the individual workers and groups of workers, that contain clear definitions and easy to understand definitions of obligations, of duties
of all concerned, that are easy for the employer to
administer and to implement in the workplace. They
certainly do not need wage orders that are filled with
legalese, that increase unnecessarily the paperwork
burdens of employers and the employees themselves, that
unduly restrict the availability of the flexible
schedules that are provided for in AB 60, and penalize
unintentional mistakes by workers and their employers
with increased legal and/or financial obligations.

I will work, if it’s permitted, Mr. Chairman,
through the sections and provide specific comments for
each section in the interim wage order that is currently
before you for consideration.

The first section is the applicability section
of the proposed interim draft wage order. Currently, as
you well know, there are fifteen valid wage orders that
cover such industries as manufacturing to amusement parks
to broadcasting and to hospitals and hotels. However,
four industries have been historically exempt from the
IWC wage orders, and those have been, historically, on-
site construction, mining, drilling, logging. And we
contend, as the Coalition, that these industries -- that
these industries cannot be subject to the provisions of
AB 60 because AB 60 is a restoration of the 8-hour
overtime requirements, and, as you also know, the five wage orders only were affected by actions taken by the IWC in 1997. Those wage orders were 1, 4, 5, 7, and 9. And we contend that you cannot restore something that was never in effect in the first place.

There are, attached to our comments, two court cases. I do understand that one is not published, and the other one has been -- the other one actually has been concluded with a stipulation from the Division of Labor Standards Enforcement and the State Labor Commissioner. And this is the Cooper Heat decision, that the industry of on-site construction is not regulated and is not under the issue of overtime, according to their office and that court stipulation. As I said, it is attached to our comments.

So, we do oppose their coverage underneath the interim wage order and would respectfully request that if the Commission so desires to cover these industries in the future, that they actually follow the procedures laid out in the current state Labor Code, which requires public notice, public participation in hearings, convening of wage boards with members of both the employers and the employees affected, in order to legally adopt a wage order that actually covers those industries
in the future.

Right now, we do have some very significant issues with that and would certainly work with the Commission, if they do decide to convene those wage orders.

In proposed Section 2, which is the definitions section of the draft interim wage order, there was -- there’s some issues of concern to the Coalition. And one of the issues is how the definitions are coming to be interpreted within the draft interim wage order. And at the December 15th hearing of the Industrial Welfare Commission, the State Labor Commissioner delivered -- hand-delivered a memorandum to the Commission, which is now published up on their Web site, the Department of Industrial Relations’ Web site, detailing a number of policy decisions that the Labor Commissioner seems to have taken it upon that particular Division to decide AB 60 actually does or does not cover, and actually take some steps that we do find actually constitute an underground regulation.

And there was a decision that came down a few years ago called Tidewater Marine Western, Inc. v. Bradshaw, where they did find that the policy and procedure letters issued by the Department of Industrial
Relations and the Division of Labor Standards Enforcement must be actually adopted through the Administrative Procedures Act. And if they do not do so, they are in violation of the law and have, in fact, issued an underground regulation.

We respectfully request that the memorandum that was hand-delivered to the Commission be stricken from your record and removed from the policy record determinations that you see -- or that you might have with the interim wage order.

Proposed Section 3 is the executive-administrative exempt status. There are certain provisions in this particular section that the Coalition members have some concerns about. We believe that, unfortunately, the way it is currently constructed, you will be, in effect, eliminating the ability for businesses throughout the State of California to have a part-time manager. And the reason for that is the provisions within AB 60 do say that there is a salary requirement, along with a duties requirement, obligation for these exempt workers. Now, the way that it looks as though it -- that it could be interpreted -- and this is an example -- is that you could literally not have a part-time manager who made less than a little less than
$24,000 per year. And if you don’t initially meet that
salary test, then that manager status is immediately
eliminated. The Coalition does urge you to review this
issue and to find some way to allow small businesses and
businesses of all sizes, in fact, to have a part-time
manager.

Now, when you get to an exempt status -- I’m
sure all of you are familiar with the duties and the
salary requirements that are set out in the federal Fair
Labor Standards Act -- but what you have within there is,
once they have reached that exempt status, overtime, of
course, is not due. What that permits, on a part-time
manager basis, is that money that might be set out and
aside for overtime purposes to then be directed towards
benefits that that part-time manager might not otherwise
be able to obtain.

A good example of this is -- I had a small
business call me the other day and say they’re changing
the status -- 25 employees -- they’re changing the status
of three of their part-time managers to nonexempt
workers, and that, by doing so, it’s costing them their
ability for pension co-payments from their employer, co-
payments on their health insurance by their employers,
and other fringe benefits that that employer supplies,
because the money now must be directed towards that salary base that you have before you in the interim wage order as it currently is drafted.

We do think it would be a positive solution for the Commission to consider permitting a pro-rataion of the salary test so you do maintain the ability for managers -- for businesses to have a part-time manager, people who may just work during the day when their children are at work, but they may not meet, you know, the -- they may not go over 20 or 25 hours in the course of a -- in the course of a week or a course of a -- their workweek. So, we do think that’s an important item for you to look at, because I think it would be a significant adverse impact on the workers of California, more than anything else. And I believe that this administration certainly has always advocated an expansion of benefits rather than a limitation of it. And by doing so, you certainly would be able to keep the ability of employers to supply those health and other benefits to their workers.

COMMISSIONER CENTER: Ms. Broyles?

MS. BROYLES: Yes, sir.

COMMISSIONER CENTER: In reference to that, would you -- you’re proposing an exemption for part-time managers. And what -- have they got 20 hours a week?
MS. BROYLES: Normally, part-time -- anything over usually 30 hours is considered a full-time employee, either by case decision -- we find it in the unemployment insurance side of that. Usually they use a determination of a full-time employee as anything over 35. I think the hours that normally are considered part-time usually fall between 20 and 30 hours per week, normally for a manager status, for a part-time manager status.

COMMISSIONER CENTER: And in reference to losing benefits, would you consider in your proposal that only part-time managers that receive health benefits and pension benefits would apply to this?

MS. BROYLES: It would be something that we’d be willing to work on with the Commission.

COMMISSIONER CENTER: Thank you.

COMMISSIONER BROAD: Chuck, I have a question.

I’m completely puzzled by this. For about the last sixty years, we’ve had a salary test, and it’s changed by the Commission every once in a while. And last time, and where we left off, it was $1,100 a month. The bill merely pegs it at twice the minimum wage.

Now, if we pro-rate it, let’s say we say that somebody works 20 percent. So, we take 20 percent of twice the minimum wage, and that’s their salary, and then
they’re exempt, and then the employer, because they’re exempt, can work them an unlimited number of hours per week without overtime. It’s an exception that eats up the rule in its entirety.

MS. BROYLES: I -- Mr. Commissioner, I would -- I do disagree with your assessment of that.

Within the bill, you do have a definition that it is a full-time employee at 40 hours. I don’t think that you get --

COMMISSIONER BROAD: Where is that?

MS. BROYLES: You’re looking at Page 9 of the bill, Section -- it’s Section 9.

"Section 515 is added to the Labor Code to read: . . . "For the purposes of this section “full-time employment means employment in which the employee is employed for 40 hours per week.""

COMMISSIONER BROAD: Uh-huh. And then, of course, that is only based on what’s in 515(a), which says that,

"The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees,"
provided that the employee is primarily engaged in the duties which meet the test of the exemption and the employee earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."

MS. BROYLES: Well, you also have it followed by a subsequent section, Mr. Commission, where it says, "The commission may establish additional exemptions to the hours of work requirement under this division where it finds that hours or conditions of labor may be prejudicial to the health or welfare of employees in any occupation, trade, or industry."

COMMISSIONER BROAD: Uh-huh, but not for people that earn less than twice the minimum wage.

MS. BROYLES: I would probably suspect that that is something that would probably be left to the discretion of the Commission, and it would be to your -- it would be your decision to make. And that’s why I’m here advocating that change.

COMMISSIONER BROAD: Thank you.

MS. BROYLES: If I might continue, Mr. Chairman?

COMMISSIONER CENTER: Yes.

MS. BROYLES: Proposed Section 4 is the daily
overtime, the general provisions. We do appreciate the
language that has been crafted by the Commission staff.
I think there is -- while we think it certainly clears up
a problem that you have with some definitional terms
within AB 60, there’s been a lot of discussion and
confusion over two separate terms, which are “seventh day
of the workweek” and “seventh consecutive day of work in
the workweek,” which, as you all know, are terms with
substantially different meanings. We do think that the
language is certainly a clarification on it, although we
would -- there was one additional item that we do not
have in our written comments that I will follow up in a
letter to the Commission, that the words “in a single
workweek” be added after that so there is no problem in
clarity, that it would say instead -- the language -- I’m
sorry -- the language in here, that “Any work in excess
of 8 hours on the seventh day of a workweek shall be
compensated at no less than twice the regular rate of pay
of an employee.” While this provides the same right to
the double time after 8 hours on the seventh day of the
workweek, it does not require that the employee worked
any of the first six days of the workweek, the way it’s
currently written in AB 60.

So, what we do need to have put in there, in
Section 4(B), after the word “seventh” is the word “consecutive day of work in a single workweek,” would be our proposed language.

In proposed Section 5, which is the alternative workweek section of the draft interim wage order, we do have some concerns about this, that in Section 5(A), that you considered -- that you continue, unfortunately, a policy of allowing or requiring any hour outside the agreed to alternate schedule, that it must be compensated at overtime rates of pay. And this is, unfortunately, one of the things that we have found within AB 60, there are a lot of contradictions within the language, and we think that adding the ability to use make-up time, if you’re also on an alternate workweek schedule, when the employee requests and the employer agrees to it, that you would find a way that if an employee is working an alternate workweek, say, of Monday through Thursday, for personal reasons they end up missing Monday and wish to work Friday, which is outside of the agreed to schedule, without this clarity that they can use make-up time, the employer would be obligated, under the language as you propose it, to pay time and a half for all hours on that extra day of work that they’re doing the make-up time.

We do think that the addition of adding the term
-- that "At the employee’s request and with the employer’s agreement, workers using a valid alternate schedule may make up time, up to 11 hours in one day, as permitted in AB 60, outside of the valid -- outside of their scheduled hours may do so without the employer incurring the obligation for overtime," that that is using -- that basically, what that does is permit the use of make-up time for those workers who are using the alternate schedule.

And I don’t think that is, in any way, something that goes beyond the spirit of what AB 60 intended to do. But we do feel that it has to be specifically stated. Otherwise, we have found ourselves in times past, under Wage Orders 1 and 4 and other wage orders that have alternate schedules permitted, with the vote and everything else having been conducted in a valid manner, the Labor Commissioner has opined on a number of occasions that any outside -- any outside hour, outside that agreed to schedule, must be an overtime hour of compensation. And we do want to make sure that the make-up time is available to those workers.

COMMISSIONER DOMBROWSKI: A question.

MS. BROYLES: Yes, sir.

COMMISSIONER DOMBROWSKI: In layman’s language,
if you’re working a 4-10, Monday through Thursday --

MS. BROYLES: Um-hmm.

COMMISSIONER DOMBROWSKI: -- but you, for

whatever reason, can’t work Monday, you want to make it

up on Friday.

MS. BROYLES: Correct, sir, same workweek.

COMMISSIONER DOMBROWSKI: That’s what you’re --

MS. BROYLES: Proposing.

COMMISSIONER DOMBROWSKI: -- asking for

clarification on, right?

MS. BROYLES: Yes, sir.

COMMISSIONER DOMBROWSKI: Thank you.

MS. BROYLES: There is one additional suggestion

that we do have on this section, that -- well, actually,

I’ll -- I can mention -- or I can mention it in just a

moment -- is the issue of compensatory time as currently

permitted under the Labor Code. In proposed Section 8,

which is make-up time, you do have the ability for those

workers to make up time, at the moment, if they’re not on

an alternate schedule that has been voted on by two

thirds of the employees. What we do want to make sure,

that -- first, that you do two things within this

section, is that you, one, allow that employees either to

use the make-up time that is provided for in AB 60, but
that also, in the posted wage -- the posters for the wage orders, that they also notice, where permitted under the Labor Code -- and that’s not all of the wage orders, so -- as you’re aware, but that where compensatory time may be permitted for employees covered by a particular order, that they are notified of their ability also to accrue compensatory time as well, and that compensatory time is currently authorized in current state Labor Code 204.3.

Additionally, with the make-up time, in order to reduce the paperwork burden on all concerned, there are many times when you know in advance that there will be a need to continue to be absent from the office for a personal obligation for an ongoing period of time. In the wage -- in the draft interim wage order at the moment, you have, I believe, up to one month. We would like to suggest that you have the ability to go, say, for a semester, if you have a student -- an employee who is also a student on a part-time basis, so they can give you a note at the beginning of the semester that they have an ongoing obligation and be able to give you one piece of paper rather than have to give you subsequent pieces of paper each and every month that they’re in school.

Additionally, where you think it’s permissible or advisable, we would like to see the ability to be
electronic notification if the employer wishes to do or 
the employee so requests.

COMMISSIONER DOMBROWSKI: Question.

MS. BROYLES: Yes, sir.

COMMISSIONER DOMBROWSKI: Since I don’t think it 
actually spells out how notification has to be done, it 
seems like it would be broad enough to already been 
interpreted that it includes electronic. So, I’m not 
sure we have to take action on that.

But, second, I know we’ve talked about this 
issue of the time frame, and it’s at a month. And you’re 
-- you know, various people talked to various -- what is 
-- I guess I woke up this morning and I started to 
wonder, what’s the purpose of us spelling out the exact 
time frame anyway? What are we trying to accomplish?

COMMISSIONER BROAD: Well, it seems to me that 
we have a lot of things working here, which is, one, that 
at some point, when people are saying they’re going to do 
make-up time for the next three years, you know, they 
should be having alternative workweek elections --

COMMISSIONER DOMBROWSKI: Well, nobody has 
talked --

COMMISSIONER BROAD: Right, right. So, you have 
to distinguish between make-up time and the right of
employees to vote on an alternative workweek schedule.

And the make-up time provision is really intended to be, I believe, in the statute, more of an ad hoc type of request. That’s what the opponents of the bill were asking for, you know: “What if an employee, during the week, has to go to a doctor’s appointment or a kid’s softball game and wants to make it up in the same week?” By making it a month, we’re kind of extending it, I think, to -- for foreseeable events.

I’m also troubled that we’re talking about kids in school and we’re talking about minors who are, by necessity in this, would be working more than 8 hours a day while they’re in school, which includes high school. And I’m concerned that when we start creating a schedule that goes on and on and on and on like this, without it falling into the alternative workweek provisions, that we’re creating a situation where we’re going to deprive those young people of free choice.

Having to do it once a month I don’t think is an extraordinary burden, especially if they can send an e-mail note or just fill out a little form, which is the entirety of the burden.

MS. BROYLES: Mr. Commissioner, if I wasn’t clear on that, I do mean that if I have an employee, not
a minor, who is an adult employee, who is returning to
school either to update their skills or increase their
viability in today’s very, very competitive labor market,
and make themselves either more valuable to the employer
that they’re working for or to others, I don’t believe
that that is -- what should be viewed as an inappropriate
use of the make-up time. But because you do know for a
long time in the future -- so, would it be, then -- and
if I might ask this question -- would it then be
permissible for the employee to hand the employer six
notes saying that, “For the next six months -- saying
that for June and -- or for September, October, November,
December, I’m going to be in school, and here they are”? I
mean, that’s another way that you could do it, but
would that be something that would match to what you
would require but -- what I’m requesting, actually do the
same thing?

COMMISSIONER COLEMAN: If I may comment, I
think, actually, the difference between this issue and
having the entire work unit vote for an alternative
workweek is because this is an individual request for a
special --

MS. BROYLES: Consideration.

COMMISSIONER COLEMAN: Yeah. And it wouldn’t
make sense, it seems to me, to have the entire work unit vote so that I can take off the next six months to go to a class. And so, I think that’s the question here, is whether we want to be able to provide that additional time frame in terms of flexibility, if I understand you correctly.

MS. BROYLES: Yes, Ms. Coleman. And quite frankly, the title of AB 60 also includes the words “workplace flexibility.” And I think this is one way that, certainly, the Commission could help address that need to balance the work life needs of workers and their employees -- and their employers, because the frustration has always been that when you have the needs from outside of work that are distracting the worker, or the need to pull away and be away from the workplace for any period of time where it might affect their pay, you have additional stresses being placed on both the workers who are trying either to deal with those stresses, or the employer who’s trying to deal with the short-term absences that can disrupt the productivity of a workforce.

I’m going to go back one section -- I’m sorry I skipped over it, but it seemed appropriate to do so at the moment -- proposed Section 7, which is the collective
bargaining agreement section of the draft interim wage
order. There was some very specific language in AB 60
that said that as long -- so long as the collective
bargaining agreement provided for premium overtime rates
and an hourly wage rate that is at least 30 percent
higher than state minimum wage, that those workers
subject to that collective bargaining agreement are
exempt from the provisions of AB 60.

We do propose that, in order to reduce confusion
in the future, that the Commission at least entertain the
idea of putting in a specific statement that if workers
are to be exempt from the provisions of AB 60, then the
collective bargaining agreement must contain premium pay
provisions for all overtime hours worked as determined by
the collective bargaining agreements or the parties to
the collective bargaining agreement. And we think that
would be something that would significantly clarify the
matters for some of our members who are dealing with this
issue as different CBAs are being examined to see if they
do actually meet the requirements laid out in AB 60.

Excuse me.

In the section, the final item that we do want
to say, and specific to language in the proposed interim
draft wage order, proposed Section 9, which deals with
meal periods, certainly we do appreciate the language, again, that has been crafted by the Industrial Welfare Commission staff and do certainly endorse what it says. We do feel, though, that it does need one statement or one clarification. Prior to 1997 and the changes to the wage orders on the overtime issue, those wage orders do contain permission for on-duty lunch -- meal periods. And we do want to make sure that those on-duty meal periods remain permissible in the future. And a statement to that effect within the wage order certainly would be appreciated.

If you have any other questions, I believe that concludes our comments here today. And I again thank you on behalf of the associations that I’m representing here today under the California Employers Coalition and the California Chamber of Commerce for the opportunity provide these comments to the Commission.

COMMISSIONER DOMBROWSKI: I want to -- I want to go back to the pro-ration on the part-time manager. I was reading -- I was reading this as an interpretation, not as a new exemption. Am I missing something in that regard? Because I believe it’s the DLSE memo that we’re really talking about -- and the Commission can review this.
From my industry’s perspective, we’re talking about people who are working mostly 20, 25 hours.

MS. BROYLES: Yes, sir.

COMMISSIONER DOMBROWSKI: And Commissioner Broad has kind of confused me, when he -- I don’t understand how this blows up the statute. I just -- I don’t get it, and I’m missing something there.

COMMISSIONER BROAD: Because what the final result is, that the worker is exempt from overtime, which means that, let’s say, you schedule -- you say your regularly scheduled workweek is one day, and then you pro-rate it, and you say you have to meet a minimum salary test of one fifth of the minimum wage. And that’s your test.

COMMISSIONER DOMBROWSKI: You’re not going to be a part-time manager working one day.

COMMISSIONER BROAD: Okay, two days, whatever, 20 hours a week.

COMMISSIONER DOMBROWSKI: All right.

COMMISSIONER BROAD: Then the consequence of that is that you are exempt, right? You’re exempt from overtime, at which point the employer can assign you to work an unlimited number of hours without the payment of overtime, which means that the actual remuneration test,
for someone working 30, 40, 50, whatever hours the
employer wants, without overtime, is less than what the
statute requires. And any employer that would have any
brains that wants to exempt their managers would just say
that your regular schedule is less and then ask them to
work a whole bunch more hours, in which case you would
never even --

COMMISSIONER DOMBROWSKI: But when you hit the -
- we said 30 hours in judicial case history, 40 hours in
the statute -- when you hit that threshold, you get
kicked into the full-time manager category. You’re no
longer a part-time manager. I don’t -- how does that --
how do you -- it doesn’t -- I don’t see how it works.

COMMISSIONER BROAD: Well, then, what you’re
saying is you wouldn’t be exempt, if you were one of
these people. You couldn’t work more than the number --
than the part-time hours you’re assigned to work.

COMMISSIONER DOMBROWSKI: You’d still be meeting
the -- it does meet the salary test. The issue is the
salary. It’s not the duties, it’s the salary.

COMMISSIONER BROAD: Right. But once you meet
the test, you’re exempt, and you can work an unlimited
number of hours without the payment of overtime.

COMMISSIONER DOMBROWSKI: Unlimited number of
hours in a day. But I don’t see how you can accumulate many during the week and still maintain your part-time status. You’re still part-time.

COMMISSIONER BROAD: So, what you would be saying, then, somehow, is that they would -- if they actually worked the overtime, they would lose the exemption.

COMMISSIONER DOMBROWSKI: Under your scenario, if they worked these unlimited hours, I guess they’d lose the exemption, yeah, or they’d have to qualify -- I assume they would qualify. They’d have to meet that salary test. Whether they do or not, I don’t know. I guess we’d have to do some number-crunching to see an example. But I -- I believe they’d have to make it.

COMMISSIONER BROAD: It’s something in the area of advanced mathematics, I can see that now.

COMMISSIONER DOMBROWSKI: I’m beginning to think so too.

(Laughter)

COMMISSIONER CENTER: Thank you, Ms. Broyles.

MS. BROYLES: Thank you, Mr. Chairman, commissioners, again.

COMMISSIONER CENTER: Mr. Rankin.

MR. RANKIN: Good morning. Tom Rankin,
California Labor Federation.

I originally was going to have very little to say because, basically, we are pretty much in agreement with your draft interim wage order. But I would like to take the opportunity to comment on a few things, and maybe add one or two things, comment on the previous testimony.

First of all, in terms of the issue of the four industries which used to be not covered by wage orders, under some interpretations, but, as we all know, there are lawsuits involved as to whether or not they actually were covered. But the lawsuits are irrelevant. The statute -- and you’ve heard plenty of testimony on this -- the statute clearly covers these four industries. And so, it’s -- your proposed order is correct. And it’s absurd to argue that AB 60 is solely a restoration. I could go through AB 60 and go through all the statutory provisions that are different from what was in the wage orders, but I’m not going to take your time doing that.

In terms of definitions, I want to support the testimony of the nurses from our affiliated union, UNAC, regarding the question of exemptions. But I might point out that your -- the language you do have in your Section 3 regarding nurses doesn’t totally reflect the statute
and could -- if you do want to do something about midwives -- could cause problems.

It doesn’t contain the language about “employed to engage in the practice of nursing.” That’s all.

In terms of the question of part-time managers, we didn’t change anything in AB 60, as Commissioner Broad stated, other than to increase the wage amount. And so, I would certainly want to leave it there. I think you’re going beyond the law if you start playing around trying to define a part-time manager -- and it, as Mr. Broad, it totally opens it up to abuse. And, you know, it’s never been there. There’s never been an exception for a part-time manager, in any of the wage orders, ever since they started.

COMMISSIONER DOMBROWSKI: The only -- the reason, Tom, that I want to look at it is, quite frankly, because people are -- they work 25 hours, they qualify for the healthcare plan, or some portion or some contribution, things like that, in my industry. So, I’m not -- I’m just saying if we’re uncovering a problem that’s developing in the employer community because of this, and people are losing that status because people are interpreting it that way, I think the Commission needs to look at it.
MR. RANKIN: The problem is that they will be worked endless overtime hours.

COMMISSIONER DOMBROWSKI: But that’s -- Tom, look, I’m -- I’m with you. If that’s -- it there’s a possibility that that’s going to be abused, to blow through the law, we’re not going to do that. That’s not what our -- we don’t have the authority to do it, first off. But what we need --

MR. RANKIN: Yeah. You have to -- you have to remember that the wage criteria is very low to begin with. Remember, we tried to make it three times the minimum wage; we compromised at two times the minimum wage.

COMMISSIONER DOMBROWSKI: Yeah. And you and I have talked about that.

MR. RANKIN: Right.

COMMISSIONER DOMBROWSKI: But I guess that’s where I think we ended up. Let’s -- I, at least -- I’m going to ask the Chamber and some others -- let’s come up with some real-world examples of these people, and let’s see the numbers, and let’s start trying to see what happens when you -- when you do this kind of pro-ration. I mean, that’s the answer, instead of us dummies up here sitting here kind of speculating about what happens, I
think, because I -- none of us know how the numbers

crunch out.

COMMISSIONER BROAD: Just speak for the two of

us.

COMMISSIONER DOMBROWSKI: The two of us.

(Laughter)

COMMISSIONER DOMBROWSKI: I’m sorry. I’m sorry.

COMMISSIONER CENTER: Make it three.

(Laughter)

MR. RANKIN: Okay. The next issue I might touch

on is the question of the make-up time. I think what you

put in, in terms of notice, is reasonable. You have to

remember that make-up time is not supposed to be -- even

on an individual basis, is not supposed to be a way of

going around the overtime requirement. Make-up time is

there to accommodate the employee. But remember, the

employee has no absolute right to make-up time. They

employer can say no every time an employee requests make-

up time. If it were the other way around, maybe we’d

have a little more flexibility here. But the employer is

not required to give make-up time.

COMMISSIONER DOMBROWSKI: Okay. I’m the dummy

again. Under that scenario, it seems -- why wouldn’t the

employee want to have as few -- or have to request as few
times as possible instead of this -- instead of more
times?

MR. RANKIN: The -- look, the statute is crafted
to protect employees where there’s no --

COMMISSIONER DOMBROWSKI: Correct.

MR. RANKIN: -- collective bargaining agent. We
know what kind of pressure employers can put on
employees. We do not want to open up the situation where
an employer can go to an employee and say, “Hey, I really
would like you to put in a long-range request for make-up
time to do this because it accommodates my needs.”

COMMISSIONER DOMBROWSKI: I agree with you that
that’s inappropriate.

MR. RANKIN: And that’s why we have that.

Hey, as I said, it’s discretionary with the
employer. I would like to see in a statute where the
employee had the right to get make-up time; we didn’t get
it.

COMMISSIONER BROAD: Also, Tom, the thing that’s
also troubling is that in Labor Code Section 513, which
deals with this, it says, “An employee shall provide a
signed written request for each occasion that the
employee makes a request to make up work time pursuant to
this section.” That’s pretty explicit language. Now,
we’re stretching that to a month. If we stretch it too –
you know, some -- it’s probably stretching it as it is.
I think, when we go beyond that, we’re up against
statutory language that’s pretty clear.

COMMISSIONER DOMBROWSKI: Well, I -- and I agree
with you, we can’t stretch it. We are -- there are
parameters. But I also recall that this issue, during
the whole legislative process, was debated by parties,
and there was difficulty in coming to some agreement
about what it meant.

COMMISSIONER COLEMAN: If I can just respond as
well, I agree there needs to be protection -- obviously,
that’s the whole point -- for the employees. And the way
that the proposed language is, it’s still at the
employee’s request. So, I think the only difference is
the length of time, but not --

MR. RANKIN: I know it’s supposed to be at the
employee’s request. I’m -- the statute’s written, I
think, partly to protect solicited requests --

COMMISSIONER COLEMAN: Right.

MR. RANKIN: -- by employers.

COMMISSIONER COLEMAN: Right. And I think
extending it continues to do that while allowing
increased flexibility for the employees. I think that
was the --

MR. RANKIN: Well, I don’t think it allows increased flexibility. All you’re talking about is whether -- how often an employee has to make the request. It’s not a big deal, I don’t believe, to put in a request once a month.

COMMISSIONER COLEMAN: If you have a company like Hewlett-Packard, with hundreds of thousands of employees, that’s -- what appears to be a small hurdle here can actually turn out to be a larger bureaucratic hurdle. So,

I --

MR. RANKIN: Well, how do they take care of sick leave, which happens on a haphazard basis every week? If they can take care of that, I would think they could take care of these requests.

COMMISSIONER COLEMAN: Again, it’s a minor thing that I don’t think violates the spirit of the law.

MR. RANKIN: Finally, something’s come up that I think has been missed in the regulations, and this is a situation where workers have voted for an alternative workweek, say four 10’s, and then what happens when the employer decides to send someone home after nine hours? Does the employee get paid overtime for the ninth hour?
And we believe they should, and we believe that that should be clarified in your proposed interim wage order.

The danger if it’s not done is that employers will encourage the adoption of alternative workweeks and then they can use it as a way to cut compensation by having people work less than the 10-hour day and not paying them overtime. So, I think that this is something that needs to be dealt with in the interim wage order, to make this clear that if someone is working an alternative workweek which has been legitimately voted on, and for whatever reason is sent home after 9 hours on one day a week or four days a week, that employee is eligible for time-and-a-half pay for that one hour a day.

COMMISSIONER DOMBROWSKI: A question just came to my mind. If -- because, again, I don’t want to see this -- I don’t believe there’s any -- there shouldn’t be a loophole here, as you’re describing. But what happens in a situation where you have a manufacturing plant, you’ve got a four 10-hour day, and maybe -- maybe I’m again going to demonstrate my ignorance -- but some mechanical problem happens that day. You’ve got to shut it down after 9 hours. Does the manufacturing plant pay for the four 10’s? Do they pay for 10 hours --

MR. RANKIN: No, they wouldn’t pay 10. I’m
saying, for the ninth hour.

COMMISSIONER DOMBROWSKI: No, I’m actually -- if you knew -- I don’t know if you know this, Tom, so I don’t put you on the spot, but in a situation like that, where an unforeseen physical thing happens in a plant, for instance, would those salaried employees get paid less that day because they went home, or would they get --

MR. RANKIN: They’re hourly employees.

COMMISSIONER DOMBROWSKI: They’re hourly. They’re -- I’m sorry -- hourly employees.

MR. RANKIN: If they’re salaried, they probably aren’t covered by overtime.

COMMISSIONER DOMBROWSKI: If it ended -- I’m sorry -- if it ended at 9 hours, the problem here, 9 hours, because of a -- would they get paid for 9 or would they get paid for 10?

COMMISSIONER BROAD: I believe most employers would pay them for 9, the hours -- number of hours actually worked.

COMMISSIONER DOMBROWSKI: And in that case, your problem comes up, because they should get paid overtime for that one hour?

MR. RANKIN: Correct.
COMMISSIONER DOMBROWSKI: Right?

COMMISSIONER BROAD: I think that the problem here is illustrated more by looking at the situation where we, at the present time, at least, permit 12-hour days. Suppose an employer holds an alternative workweek election and says, “Your normal work schedule is three 12-hour days,” and the employee -- and it’s supposed to be a regularly scheduled workweek of 12-hour days. And what the employer -- and it’s in an occupation where there may be times of the week where the business flow is such that some days you need the person for the full 12 hours, and some days you don’t. And you -- that employer, then, you know, sends the employee home after 11 hours one day, and then the next day it’s after 10 hours, and then the next day it may be 12 hours, and then the -- and it fluctuates. And, in effect, what the employee is deprived of is the statutory right to have a regularly scheduled workweek.

And I think the remedy for that is just to say that if the employer deviates from the regularly scheduled workweek -- workday in that workweek schedule, and -- but requires the employee to work more than 8 hours a day but less than the schedule, that that day becomes just a normal daily overtime day. And it will
discourage taking what is supposed to be a regularly
scheduled alternative workweek and turning it into some
kind of weird on-call process.

COMMISSIONER DOMBROWSKI: Right. Thanks.

MR. RANKIN: That’s it? Thank you. Any other
questions?

COMMISSIONER CENTER: Thanks for giving us these
duties here. We appreciate it, Tom. You’re keeping us
busy.

With that, what we’d like to do now is go into,
first, the industries that were not covered under
Industrial Welfare Commission orders -- that would be the
mining, logging, construction, and oil production -- then
go into the healthcare industry, and then go into general
comments.

So, we’re looking at probably 45 minutes on the
non-covered industries in the past. And with the
concurrence of the Commission, we’ll go to a 30-minute
break at one o’clock.

Is that enough, 30 minutes, for lunch, or you
want more?

COMMISSIONER BROAD: Why don’t we get 30 minutes
at 12:30?

COMMISSIONER CENTER: Okay, 12:30, 30 minutes.
That way we have it between our fourth and fifth hour.

COMMISSIONER BROAD: Yeah.

COMMISSIONER CENTER: There we go.

(Laughter)

COMMISSIONER CENTER: With that, I’d first like to bring up the construction industry and the individuals that want to testify, first, on opposition to coverage under overtime and still consider the exemption to apply, for construction.

I’m getting names here, I think. And if there’s more than one, if you have a spokesman, what we’re doing is attempting to do five minutes and limit to three for the non-spokesman.

So, you can come up and state your name.

MR. CLARK: Good morning. My name is Donald Clark. I’m a registered civil engineer. I represent our construction company, which is Clark Pacific. Our firm is located in West Sacramento as well as down in southern California. I’m an owner and a partner of that firm. We have approximately 350 employees. We engineer, manufacture, and we do on-site construction. Both of our manufacturing plants, and also our on-site construction crews, are under collective bargaining agreements. Our firm is a member of Construction Employers Association.
Our firm supports the construction --

construction being part of the interim wage order. We believe it makes sense. It’s what’s generally the practice now in the construction industry. And we believe it’s also good for the worker, as well as, we feel, it keeps the playing field level for us, for our firms that are part of collective bargaining agreements.

I think it’s good for the worker, number one, for safety, is that we believe that long hours --

construction is tough work, and long hours in the construction industry has an effect on safety. Safety is a primary concern to our firm and to the majority of construction firms. Working over an 8-hour day in any one-day period starts to have an effect. And I believe, you know, this interim wage order provides a financial disincentive for firms to work over 8 hours unless they have to.

I would think it’s also fair. Construction is hard work. And we believe that our workers in our manufacturing facilities, as well as in on-site construction, should be paid over -- you know, overtime for work over 8 hours in a day.

Also, I think it’s fair because our manufacture -- we produce what’s called architectural pre-cast
concrete panels, which go on the outside of buildings. It’s -- the Attorney General’s building here in Sacramento, as well as the Shriner’s Hospital, have our product on it. And the workers in our manufacturing facility, they drive equipment, they pour concrete, they tie rebar, they do all the same types of work that our workers out at the job site do. It doesn’t seem right that our workers in the plant would have to follow -- you know, we follow one rule with them, and then, for some reason, it wouldn’t be -- you know, the workers out on the job sites don’t fall under the same state rules. You know, we, just again, just believe -- you know, our firm supports that construction is part of the interim wage order.

Thank you.

COMMISSIONER CENTER: Thank you.

Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

MR. CLARK: Thanks, Chuck.

COMMISSIONER CENTER: Anybody -- I have cards here. Anybody that opposes construction being covered in the interim wage order, from the construction industry?

I’ve got to start going through names, then.
And why don’t you --

How about Patricia Gates, Scott Wetch, Jamie Khan, Tom Cadell?

MR. WETCH: Hi. I’m Scott Wetch. I’m here today representing the State Building and Construction Trades Council on behalf of the more than 300,000 men and women employed within the construction trades in California.

First, I’d just like to spend a moment dispelling this argument that somehow, the construction industry, along with logging, mining, and drilling, is not covered under AB 60. The court cases that were mentioned earlier by the representative of the Chamber of Commerce, I think it’s important to note, are two decisions that were -- one unpublished, one published -- that were both issued prior to the enactment date of AB 60. As you know, AB 60 expressly covered all employees in the State of California under the 8-hour day, with the exception of those very few industries that were expressly exempted. And it also granted this Commission the authority to grandfather in those industries -- those exemptions that were contained in pre-1998 valid wage orders. And I think, as this Commission is aware of, nowhere in either AB 60 or in those pre-’98 wage orders
is there an exemption for construction, logging, mining,
or drilling.

In addition, I think it would be fair to -- it would be fair to say, for those of us that participated in the AB 60 discussions in the Legislature, that the Legislature, through a very lengthy and deliberative process, considered what exemptions to expressly place in AB 60. And through those deliberations, they chose not to include construction, mining, logging, or drilling.

So, having said that, the State Building and Construction Trades Council is in concurrence with the Commission in the interim wage order, with a few suggestions for inclusion in either the interim wage order or, certainly, in the wage boards.

Under the definition of construction, we believe that the -- it’s incomplete, in that remodel, renovation, and improvement, as defined in the Business and Professions Code Section -- I believe it’s Division Three, Chapter 9, beginning with Section 7025 -- should be contained within the definition of construction.

Two other issues that we have that we’d like to see addressed, if not in the interim wage order, through the wage boards, is the election for the alternative workweek. Given that in the construction industry, there
is a very fluid fluctuation of employee levels for any particular project or under any particular contractor, we believe, presents an opportunity for the unscrupulous employer to try to circumvent the rights of the employees to have a fair election. And what our concern is, that an employer will bring in their core employees, those employees that they, for the most part, keep on the payroll week in and week out, month in and month out, and hold an election that would then be binding upon the larger employee group that would be brought in to do the rest of the job. So, you may have ten or fifteen core employees conducting the election. By the peak employee point in that particular project, you may be up to two or three hundred employees.

So, we believe that there needs to be some language regarding the peak workforce to ensure that when the election is conducted, that it is done so with the substantial and regular complement of employees.

In addition, we have some concern regarding the transitory nature of the construction industry, in that an employer may be working on one project one week with a hundred employees, be on another project just another week down the road with a completely different set of employees, and I believe that that’s an issue that needs
to be addressed so that, under the language of AB 60, that all affected employees have a voice and have an opportunity to vote on their alternative workweek.

Lastly, I would request that the posting order, on the interim order and any subsequent construction wage order, that you require that rather than it just be posted adjacent to the existing wage orders, that it be posted in an area that is frequented and easily accessible to employees, because, in our industry, on a job site, it’s not like you just walk into a lunchroom, and there you have the postings of the wage orders. It needs to be a place where the employees are -- frequent toolboxes, you know, the restroom facilities and such, that they can easily access.

Yes?

COMMISSIONER CENTER: That’s in the new proposed amended orders.

MR. WETCH: Okay. I’m sorry. I didn’t see that.

With that, we thank the Commission and look forward to working in the wage board process with you.

COMMISSIONER CENTER: Thank you.

Ms. Gates?

MS. GATES: Yes. My name is Patricia Gates, and
I’m an attorney with the law offices of Victor Van Bourg, Van Bourg, Weinberg, Roger and Rosenfeld. Our office represents tens of thousands of construction workers and apprentices. We also represent workers in areas regulated by the Industrial Welfare Commission in other industries.

I’m here today to testify in favor of implementation of AB 60 by way of the interim wage order. I concur in the amendments offered just now by Scott Wetch of the State Building Trades. But I’m also here for another reason today, and that is to attempt to gradually shift both the philosophy and the work of this Commission from constantly looking at what employers want and what employers need and to instead look at what this Commission is charged by the Legislature to protect, and that is the welfare of working people.

Driving up here today -- and you’ll probably be sorry to hear I had a long drive -- I had time to think about what I wanted to say. I’ve prepared a written testimony that I’ll give to all of you, and I also brought some materials that I think will help in shifting the concern of this Commission to that of working people. But in driving up, I started to think about my boss, my boss who died recently, Victor Van Bourg, and
what he might have said had he been here. And rather
than following that to its logical conclusion, that I
could never be so eloquent, I distracted myself by
remembering something that a union member said at
Victor’s funeral and memorial service. And what he said
about Victor is that he woke up every day and said to
himself, “What can I do today to make the conditions for
working people better?” And that’s how he lived his
life.

And the parallel that I see is the parallel that
this Commission has that same charge and that same duty.
Your duty is to improve the lives of working people. The
duty is set out in statute. The duty is also set out in
case law, in Supreme Court interpretation.

Right now, your jobs have been busy with
implementing AB 60. And because of that, I think you’ve
had to look much more at what the industries and what
California businesses want from you. And this board is
made up of representatives of business and labor. But
the real work of this board is creating a floor of rights
underneath all California workers, and raising that floor
so that California workers can share in the economic
prosperity that this state and our country is enjoying
right now.
In the 1970’s, the Industrial Welfare Commission orders were largely ignored because they were enjoined. Employers went to court and enjoined the enforcement. In 1980, I was working for the Department of Industrial Relations on the day that the decision, the Industrial Welfare Commission decision, was decided, finally releasing those orders from court injunction and allowing basic wage and hour law to live in California. It was a day of great optimism.

And then came the ’90’s. And during the 1990’s, this Commission was charged with looking out -- really lost its way and began looking out for the -- for what was best for industry and business. It gave unilateral -- it gave unilateral power to the employer to order workers to work 10-hour days without overtime.

What I’d like to ask this Commission to do is to charge each of your wage boards, when you send the small issues that you can’t deal with in this large forum and issues that are best dealt with in -- by way of wage orders, to charge those wage boards with the responsibility to ask themselves that same question: “Will this change, will this amendment, will this request being made of me by this employer group, will this advance the interests of working people?,” because that
is fundamentally the job of this Commission.

Thank you.

COMMISSIONER CENTER: Thank you.

Jamie Khan, Warren Mendel.

MS. KHAN: Phil’s wondering why he’s not being called.

COMMISSIONER CENTER: Oh. Phil too, if he’s here -- Vermeulen.

Go ahead, Jamie.

MS. KHAN: Hi. Jamie Khan, representing the Associated General Contractors here.

My comments are brief. We have reviewed the interim wage order. We believe that it reflects the provisions of AB 60, and we believe that we’re covered by AB 60, and will abide by them. We do, however, would like -- or strongly urge the Commission to initiate wage boards so that the particular nuances to construction can be considered and wage order developed that is specific to construction.

And that’s all my comments.

COMMISSIONER CENTER: Thank you.

MR. MENDEL: Warren Mendel, representing the Southern California Contractors Association. And I reflect what my good friend Jamie has said.
One little thing bothers me, though, and I understand it. But employers do a little work themselves, so I don’t like to see them excluded completely when somebody’s talking about somebody working.

That’s a joke.

(Laughter)

MR. MENDEL: The thing that concerned us most in viewing these orders is the uniqueness that’s in construction. We don’t have a fixed place of work. We don’t have a fixed set of circumstances under which we work. And so, there has to be considerable flexibility in terms of controls over management of a construction company.

It so happens that this association requires participation in the master labor agreements to be a member of the association. So, we are extremely concerned that all the provisions that have been bargained into those agreements can remain in effect, and would hope that the flexibility of any changes that come up could be settled in negotiations between the craft unions and our association.

Thank you, Mr. Center.

COMMISSIONER CENTER: Thank you.
MR. VERMEULEN: Mr. Chair, members, Phil Vermeulen, representing the Engineering Contractors Association, Fence Contractors, Sacramento and Marin Builders Exchanges, and the Flasher Barricade Association.

Following up with my colleagues, we too agree that AB 60 embraces the construction industry, and we urge going ahead with the adoption of the interim wage order. Having said that, we strongly urge that wage boards for the construction industry be held as expeditiously as possible.

Our concerns are many, such as, in the Wage Order Number 4, 68-degree temperatures in restrooms, on Porta-Potties on a construction site just don’t work. You can see that those kinds of things are nuances in the construction industry which, obviously, we have to address.

So, I would urge you to go ahead and create a construction wage board as quickly as possible.

With that, thank you very much.

COMMISSIONER CENTER: Thank you.

I have Alan Smith and Eric Carleson and Tom Cadell.

MR. SMITH: Good afternoon. My name is Alan
Smith. I’m a member of the NPC, which is the National Plasterers Council. This is George Oliveira; he’s the chairman. We are basically an association of swimming pool plasterers in the state -- actually national, but this is the state representation here.

We have a unique, I believe, on-site construction industry, for we are really tempered so much by the weather and changing conditions on a daily basis. Traditionally, we are a piecework -- for the last fifty years, we pay by the pool we plaster, for instance, say, $100 per finisher per pool. We traditionally do two pools a day.

The problems we’ve run into this first month already has been in such where we have a very cool and damp day and it takes maybe six or seven hours to plaster one pool. The next day is rather warm; the gentlemen can do two pools in a day, maybe in six hours. We are losing the flexibility in the fact that when we have two pools to plaster and we think it’s going to take more than 8 hours, we simply don’t send the crews out because we -- for a second job because we can’t pay the overtime. It might run into 9, 10, 11 hours to do the second job. And the profit margins are minimal; it may be two or three hundred dollars per job. And if you have an eight-man
crew with two hours of overtime, or possibly three, we
can’t send them out because it basically gobbles up our
profit on that particular job.

On a 40-hour schedule, we can do it day by day. We can get all the work done, and then, at the end of the week, we can analyze it and see, you know, how much work can be done on that Friday. But still, they’re getting more work. For instance, the first three weeks of this month, my finishers have taken a 30 percent decrease we are not able to pay the overtime based on just not knowing when we can send these crews out. And that’s very difficult for them. Especially a lot of them have, you know, mortgages and such, like everybody else does. With the flexibility of a 40-hour week for us, we would not have that situation.

We are basically external cement finishing. It’s warm in the morning, the clouds come over, it cools off, and all of a sudden, what might have been a 7-hour day, the gentlemen make $200, turns into a 12-hour day. We have no control. It’s very, very difficult.

We also are a very seasonal business, whereas we have representatives here from different parts of the state where they might be sitting for three or four months in rain and wind conditions, not doing maybe more
than 10 hours of work a week because of those conditions.
And then, when the sun comes out for six months, they
have to make the hay, as they say, when the sun shines.
And they are limited to 40 hours, which is difficult, at
best, anyways. But now, with this 8-hour restriction, it
is very, very confining for us.

That’s really all I have to say. I just would
like to see if there can be some type of an exemption for
external cement finishing like this, especially when we
have no control over that. We’re not looking to abuse
anything. We’re just trying to get these guys to get
their amount of work in in the week. In the summer -- or
through the year, we’re averaging 35 to 40 hours a week
for ten pools per crew. My guys are making anywheres
from $35,000 for up-front coming-in guys to $70,000 a
year for journeymen. This is going to cut that 20, 30
percent through the year, from what I see.

COMMISSIONER CENTER: Thank you.

Any questions?

MR. SMITH: I’d invite some comments and help on
this. My guys asked me, basically, “Why did they do
this?” Nobody was unhappy, as far as the employee. They
were very excited about the way we’d been doing things
for years. Never a complaint. Employee, management --
we always get along great on this. And they are very perplexed right now. And they said please -- they said, “Find some answers.”

I called some Assemblymen offices to try to get some resolution on this, and I got a bunch of different answers on it. One of them said, “You have to take the good with the bad.” And I asked them, “What is the good in my instance?” And I said, “I have to go back and tell my employees something. Some of them have already put their wives to work, when they wanted to stay at home to take care of their families. That has happened already. And I have to have a little bit more than a flippant answer like that to them.” And they said, “We need something next week, not July or something,” because this is immediately affecting their paychecks.

So, any help is appreciated.

COMMISSIONER BROAD: I just had a question, whether you’ve explored the possibility of alternative workweeks in your industry.

MR. SMITH: Yes, we have. That would still limit us to probably eight pools a week, rather than the normal ten they get. So, that’s a 20 percent decrease still.

If we have the flexibility, we can do two pools
a day -- at least ten, nine to ten a week. That’s
typical in our industry. Sometimes when it’s really
warm, the crew will do three pools in a day and then
piecework under 8 hours. They’ll make $300 to $400 a
day. They’re very excited about that.

So, it takes away all their flexibility. It’s
just gone. And so, right now we’re at a loss, because we
can’t bid the jobs for overtime because you never know
what that day is going to bring, as far as weather, the
ground temperatures, moistures. You might sell the job
in February and end up doing the job installation in
July. So, it’s very, very difficult right now.

One contractor in L.A. who has fourteen crews
stopped them all to one pool a day rather than two,
because he just can’t manage that, watching constant
overtime on a daily basis.

So, nobody knows why it was implemented in our
industry when it’s been going so well for so many years.
And everybody’s fat, dumb, and happy. And now it’s just
-- boom, arbitrarily, put an 8-hour time frame on
something, and it’s hurting everybody immediately in our
industry, probably 400 companies in California. And we
want to know if there was any thought put into this
beforehand as far as our industry is concerned, because
we have a lot of people that are a little on the scared side, as far as the employees. It’s hurting the employees way more than it is the employees at this part, because we’re backlogging our work and they’re the ones really taking the brunt. We’d love to work it out for them somehow.

Any suggestions on our part, what we could do, besides maybe an exemption?

COMMISSIONER CENTER: And that could not be done until we have wage boards anyway. What happened is the law changed in January, where all workers in California are covered now. And that was not in the statute prior to January 1st.

MR. SMITH: Never has been in statute.

COMMISSIONER CENTER: Yeah.

MR. OLIVEIRA: We rely on the weather man. And as you know, his guess is as good as ours. We had rain on Tuesday, so our crews stayed home. My crew is doing two pools today so they don’t have to work tomorrow. And I’m praying to God they get them done in 8 hours, because, if not, no profit. They would much rather work a longer day than work a Saturday.

All that flexibility is gone. So, we’re hoping you guys can work with us here.
MR. OLIVEIRA: Thank you.

MR. CARLESON: Hello. My name is Eric Carleson, representing the California Spa and Pool Industry Education Council. Chairman Center, commissioners, my remarks will be brief. We represent the swimming pool and spa industry in all areas in California, including construction. But we are here today in support of this request for exemption and/or assistance for this particular subsector of the construction industry and the pool industry, and for others that we’re already starting to hear from.

In fact, as you convene your wage boards and pursue a wage order, I’m sure that we’ll be able to gather more information from some of the other construction subtrades in our industry because it is of concern to them. We did attempt, at least, to make some suggestions during last year that this might be what our industry would be looking at, and as you can see, they are looking at it now.

So, we just want to make sure that we evidenced our support of the plasterers and indicate that we’ll be working with you in the near future.

COMMISSIONER CENTER: But, Eric, do you agree
1 that in order for the Commission to do any action, they
2 have to convene wage boards?
3
4 MR. CARLESON: That the Commission itself
5 should --
6
7 COMMISSIONER CENTER: Yes. If they do anything,
8 they have to convene wage boards in these industries?
9
10 MR. CARLESON: Well, I would say that, at this
11 time, we’re receiving all of the information that’s being
12 presented in the process. And in either -- in either
13 setting, whether or not it’s a matter of asking for
14 exemptions within the wage orders or whether or not the
15 Commission is properly already in the position to
16 regulate under AB 60, we would still be seeking the
17 relief.
18
19 COMMISSIONER CENTER: Thank you.
20
21 MR. CARLESON: Um-hmm.
22
23 MR. SMITH: Because, actually, my guys would
24 like a change Monday, because it’s their check next week
25 and a lot of them have mortgages. And they’re still
26 going to ask me what happened and why, and what you’re
27 going to do. And I really would like to know, because
28 I’ve called and asked. And I have really got a
29 runaround. I mean, I’m not -- I’m just really trying to
30 get to the bottom of what’s happening to our industry.
And I have real answers by real people with real problems this is affecting, and I just can’t go back and say, “We have to wait and see.”

COMMISSIONER CENTER: Well, we have legal authority to do things, as our counsel from the Attorney General’s office advises. And also, the testimony from the Chamber of Commerce, which I’m sure you’re a member of, believes that to make any changes for exemptions, wage boards would have to be concluded before we could act on it. So, Monday is not --

MR. SMITH: I know, but I was just saying, on behalf of their wishes.

COMMISSIONER CENTER: Tuesday’s going to be tough too.

(Laughter)

MR. SMITH: They can hear that. Thank you.

COMMISSIONER BOSCO: Could I make a comment?

COMMISSIONER CENTER: Go ahead, Doug.

COMMISSIONER BOSCO: I just joined the Commission today, so I’m purposely keeping my mouth shut so I don’t make some major blunder. But I would like to say that I don’t think the fact that wage boards have to be convened precludes you from presenting your case. I, for one, am very sympathetic to working people that are
in the type of situation that your people are, and the
young lady from the law firm right before you, commenting
on helping working people. And I think certainly that’s
my interest in being on the Commission.

So, I think, if you need to go back with
something, it would be that at least one person is
sympathetic with you, and I’ll be happy to track this as
we go through our procedures. But as the chairman said,
we don’t have any authority to circumvent the law. We
have to go within our own bounds. But that doesn’t mean
that some of us aren’t at least sympathetic with your
situation.

MR. SMITH: Well, I appreciate it. Thank you.

COMMISSIONER CENTER: Thank you, Mr. Bosco.

COMMISSIONER BOSCO: Thank you.

COMMISSIONER CENTER: Thank you.

I’d like to take now the oil production industry
-- oil drilling industry. Excuse me.

I have Robert Tollen. And is John Zaimes here
for the oil too? Or --

MR. ZAIMES: No.

COMMISSIONER CENTER: Okay. That’s a different
issue, then.

MR. TOLLEN: Thank you. I am representing the
California Independent Petroleum Association, the
Association of Energy Service Companies, and the
Independent Oil Producers Agency.

We agree with the Chamber of Commerce that AB 60
does not give the Commission authority to cover the four
industries that were not previously covered, that you
can’t restore something that wasn’t there in the first
place, and that the words, quote, “any work,” close
quote, don’t put a legislator on notice as to what the
bill is doing. The legislative counsel’s analysis did
not do that either. But we understand that the
Commission has been advised by its own attorneys to the
contrary. We think that’s the direction we’re going, and
we don’t propose to make an issue of that issue at this
time.

And we think that the Commission has the
authority to regulate those four industries anyway. It’s
always had the authority to regulate those four
industries under the existing provisions of the Labor
Code. So, we would like to see a wage board convened --
a wage board appointed and a wage board convened to do
precisely that. And what we request that it do is cover
occupations involving the on-site exploration and
drilling of oil and gas, both offshore and onshore, and
the offshore extraction of oil and gas.

I said “occupations” rather than industry because, as we have struggled with how to define this, it appears that it is easier to define if you talk in terms of occupations than if you talk in terms of whole industries. And we don’t — we don’t think that this wage board should impose on onshore extraction activities that have been -- that have been treated as covered for many years under either Order Number 1 or Order Number 4.

So, we’re trying to define the offshore activities in totality and the onshore exploration and drilling activities. We propose that the wage board specifically should not cover, because it’s not really involved in what we’re talking about, manufacturing, refining, or distribution of oil and gas.

And our only wish, and the point we want to stress at this point, is that the Commission, the IWC, should appoint this wage board to start quickly. We think it will be a long process. You’re going to have to go through the process of appointing people to the wage board, deciding on the number of people on the wage board, convening it. They’re going to have to have meetings, make recommendations, report back to the Commission. And that’s going to take a lot of time. So,
our wish is that you act today to authorize the
appointment of a wage commission and start the ball
rolling.

COMMISSIONER CENTER: Thank you.

Anybody from the oil production and drilling
industries?

(No response)

COMMISSIONER CENTER: Then we have the logging

MR. EHLERS: Members of the Commission, I’m Ed
Ehlers, executive director of Associated California
Loggers. We’re an association of family-owned logging
and log trucking businesses. I’ve filed a letter with
you yesterday that’s available, so I won’t repeat that.

We’re primarily small businesses, or exclusively
small businesses. Most have fifteen or fewer employees.
We’re very weather-dependent. One of our major problems
in our end of the industry is maintaining good crews and
whatnot. I guess I -- and we’ve operated for years
without a wage order.

We think, in looking at this, that we probably
fit better under the agricultural occupations wage order
rather than the interim one which you propose. And if
you look at the definitions in 14-80, Section 2(c), 4,
and 7. Those, you know, pretty well fit us without too much trouble. And so, we would request that the Commission take some action, minutes or whatever, to recognize that we’re part of that wage order.

COMMISSIONER CENTER: Thank you. I think it’s the position of the chair that to do that, we still need to convene a wage board for your industry. Is it -- this is your position, we need to also talk to the affected employees in your industry?

MR. EHLERS: Um-hmm.

COMMISSIONER CENTER: And then, if we have compelling evidence, that might be a possibility for the Commission to act on. But I don’t think we have the authority today to act on that, without conducting wage boards in your industry.

MR. EHLERS: Okay. Thank you.

COMMISSIONER CENTER: Thank you.

Mark Vegh.

MR. VEGH: Good afternoon. I’m Mark Vegh, with TOC Management Services, a multi-employer association primarily dealing with wood products. And just very, very briefly, I will echo what Mr. Ehlers said about -- and the others -- about convening wage boards for logging as well as those other occupations in construction and
mining and drilling.

A couple other things. I also faxed over two pages of comments yesterday to the Commission. I also want to echo what Ms. Broyles said earlier this morning about adding additional words to the part in Section 4 dealing with the seventh consecutive day of work, just to clarify that that would be in any one workweek.

One additional comment that I had in my letter which I don’t think has been raised is -- deals with Section 5(G) of the interim wage order, Page 4. The language has been added there -- this deals with the --
certain alternate work schedules that were in place by July 1st of 1999, so they weren’t voted upon pre-’98.

But this is the other part of AB 60, dealing with current -- with last year’s alternate work schedules. If they were in place by July, 1999, the individual employee could agree with the employer to continue those.

In the interim wage order, the term “individual agreement” is used. Specifically, it says that the -- requires that this alternate work schedule be pursuant to an individual agreement made after January 1st, 1998, between the employee and employer. And I think that the term “individual agreement” is confusing and troublesome in this context. AB 60 doesn’t include that language in
it. It says simply that the employee has been voluntarily working an alternate work schedule prior to July of 1999.

So, the question that I raise is, what would qualify for an individual agreement? If an employee was working four 10’s -- say that that schedule occurred the first part of 1998, for example -- there would have been no need to have an election at that time. So, what would constitute an individual agreement to do that? Is it simply -- is it simply implied because the employee continues to choose to be employed and work that schedule, or is there something additional that the wage order is contemplating here?

And my recommendation would be to not confuse the matter with that term or to clarify it, to state that it’s not requiring anything in writing or anything formal, any type of formal agreement, between the employee and employer prior to July of 1999.

Those were all of my comments, in my letter.

I would like to say, briefly, one other thing by way of rebuttal to what Mr. Rankin, I believe, said, with the California Labor Federation, earlier. He made the point that if somebody was on an alternate work schedule of four 10’s, for example, and worked a 9-hour day, that
that last hour, the eighth and ninth -- between the
eighth and ninth hour, should be overtime. I think that
-- a couple of points on that.

First of all, I believe there was some
discussion at that time over some practical problems with
that, if it was beyond the employer’s control, for
example, and they had to send employees home early after
9 hours. Also, that would be very, very rigid, and
employees would be much less likely to have the
opportunity to work that type of schedule, which most
employees, in my experience, enjoy, when they have the
opportunity to have a three-day weekend. So, if an
employer was strictly held to that, if for some reason
one time they had to send people home after the ninth
hour or change that schedule for one day, they would be
likely not to ever propose an alternate work schedule.

The other thing, which is more statutory, as I
looked at Section 511(b) of the Labor Code, brought in by
AB 60, it specifically talks about overtime -- this is
the alternate work schedule section -- it talks about
overtime being required for work in excess of regularly
scheduled hours under the alternate work schedule. So, I
don’t believe -- I think that that interpretation of his
would be contrary to the Labor Code, contrary to AB 60,
Those are my comments. I’d be glad to clarify anything.

COMMISSIONER CENTER: Thank you.

MR. VEGH: Thank you.

COMMISSIONER CENTER: What we’ll do is take Mr. Holober, then we’ll break for a 30-minute lunch break if that’s -- is 30 minutes enough for the -- yeah. Then we’ll go into healthcare industry after the break.

MR. HOLOBER: Thank you very much. I appreciate your letting me speak at this time. My name is Richard Holober. For those who know me, I am now with the California Nurses Association, as of the first of the year, previously with the California Labor Federation. I want to welcome our newest commissioner.

COMMISSIONER CENTER: Watch the watch, too.

MR. HOLOBER: I will be quick. But since I was intimately involved in the design of AB 60, I did have a few comments about the interim regulations and one -- just a couple of brief comments about points that were discussed in terms of make-up time and the one-week, four-week, or lengthier periods of time for an individual request.

The history on this is, the bill is really
clear. It says “each time,” you need a note. There was a letter in the Journal that Assemblyman Knox put in the Journal to accommodate a request from Senator Vasconcellos, who said, “Well, you know, let’s be reasonable, folks. What if somebody wants to do it a couple of weeks? They have to do it each time.” So, there’s a letter in the Journal that says up to four weeks can be covered by a single written request. So, in case somebody comes and sues the IWC, that would be your paper trail. That would allow you to do this, but no more. More than that, I think, would not be permitted under the law.

On the part-time question, I know it’s been addressed, but I think there’s a serious problem that affects all industries. If an employer can define someone who’s working less than full time as a manager, and then decide, you know, “Even though you’re scheduled to work 15 or 20 hours, you’re going to work 80 or 100 hours,” it totally destroys the intent of AB 60, which was to say, “You have to at least -- you know, earn at least the princely sum of about $1,900 a month before you can be worked 70, 80 hours, without overtime.” So, I do think the law on this is clear and there’s really no room to allow for a part-time manager to then be worked 80
hours a week, unless they’re making the equivalent of
about $1,900 a month.

COMMISSIONER DOMBROWSKI: I agree with you that
a part-time manager cannot work 80 hours a week.

MR. HOLOBER: Okay. And the bill makes it
pretty clear.

The major issue I wanted to talk about is this,
and it’s a follow-up on the point that Tom Rankin made.
What we don’t want is for an employer to say, “You’re
going to have an alternative work schedule of 10,” or, in
the hospital industry, “12 hours, but I can kind of
switch it on a whim from one day to the next, so one day
you work 12, the next day we send you home after 9 or
after 10 if the patient census is a little low in a
hospital, and tough luck; you’re not getting paid for
those hours.” Is this happening? Yes, it is happening.
And I just wanted -- I did send copies of this, but I
want to, if I may, give you copies of --

COMMISSIONER CENTER: Thank you.

MR. HOLOBER: -- and this is a flexible work
arrangement agreement at San Ramon Valley Medical Center
in Contra Costa County, owned by Tennant Corporation,
which is a $9-billion hospital corporation, that
employees were asked to sign in December of last year.
Actually, it goes back to 1994, but they were all asked to sign it in December.

And basically, what this says is, “Your workday is any number of hours up to 12, and the employer can change those hours whenever the employer wants to.” That is not a regularly scheduled alternative workweek. The two words, “regularly scheduled,” are key here. If an employer proposes an alternative work schedule, they have to spell out what those hours are, and not simply allow a blanket opportunity to work you up to 12 or less than 12 any day. That -- by -- I think this is illegal, but I think the IWC should close that potential loophole by saying that if you agree to a regularly scheduled alternative workweek, up to 10 in any industry, or up to 12, for the next six months, in hospitals, that you will be worked those hours, and if the employer is using this as a way to increase or decrease hours based upon, you know, in the case of hospitals, the patient census, that you’re paid overtime after 8 for those days on which you’re sent home early.

What happens in a lot of hospitals is you’re docked pay and then you are -- that pay comes out of your vacation pay. So, your paycheck ends up being a complete paycheck, but you’re taking that money out of your own
entitlement to vacation pay. So, I hope you will address that with language that says -- makes it really clear what “regularly scheduled” means, which is not a blank check for the employer to switch people’s schedules on a daily basis. And the language in the interim wage order that is the specific language to the hospital industry should basically mirror the language for the 10-hour alternative. It does not address a couple of issues, such as the right of employees to vote -- to petition and vote to repeal that alternative workweek. It does not say that no one shall have their hours -- their pay reduced as a result of the nullification or repeal. It also does not make it clear that if you vote for something other than a 12-hour day, that you receive time and a half up to 12 hours and double time after 12.

So, I would recommend you just take the language that is in the section that deals with the 10-hour alternative workweek, which makes it clear for hours beyond the regularly scheduled alternative work schedule, you get time and a half up to 12 and double time after 12, that should be reflected in the healthcare section as well, as well as the right to repeal and the fact that no one should suffer a reduction in their hourly pay if
there’s a nullification or repeal.

Those are -- those are my comments. I appreciate the opportunity.

COMMISSIONER BOSCO: I had a question. Since you were involved in the legislative process on AB 60, did the Legislature consider the question of working people who might be forced to work below the regularly scheduled workweek? Did that ever come up? I mean, it’s come up here --

MR. HOLOBER: It -- I think the issue came up very clearly that “regularly scheduled” means a guarantee that if you’re voting to do something that is considered generally not advantageous to a worker, namely, working longer than an 8-hour day, that that -- you have a deal that both sides will honor. What no one contemplated was the notion that flexibility is controlled only by the employer. There was ongoing debate for six months around “What does flexibility mean?” And we said it should be for workers, so that a worker should control their hours. The employers said, “Well, we want workers to have maximum personal freedom, but we’ll decide what their hours are.” And the deal was cut. The employer puts it in writing, it’s very clear about what that schedule is,
and the workers then vote for it. And once they’ve established that schedule, that is the schedule that they can expect to work.

Now, I know there’s an issue that, you know, maybe you need to talk more in-depth about Mr. Dombrowski’s point, this one -- you know, once-in-a-lifetime occurrence, right, where there’s a mechanical failure. I mean, you know, I think that’s something you need, maybe, to get a lot more testimony on.

But what I’m talking about is a huge loophole that an employer can use, and that this contract allows, where an employer can say, “You know, we’re not so busy today, folks; you’re going home after 9 hours,” even though you’ve planned your life to have 12-hour days.

COMMISSIONER BOSCO: Well, I understand the loophole. What I’m asking, though, is did the Legislature specifically consider that loophole? I mean, at committee hearings, did that issue come up and did they either not do anything about it or defer it or --

MR. HOLOBER: Well --

COMMISSIONER BOSCO: Or was it something everybody just overlooked?

MR. HOLOBER: No. I think that there was extensive testimony, in hearing after hearing, about what
is flexibility. Does it mean the boss can just send you home early one day? And this legislation was designed to say, “No, it doesn’t mean that.”

So, I think the legislation is real clear that the words “regularly scheduled” address that. “Regularly scheduled” doesn’t mean flexible. And your section in the healthcare piece speaks about “flexible scheduling.” I think those words should be struck, because that’s a term of art that employers use to say, “We can decide what the daily hours are.” It’s a “regularly scheduled alternative schedule” -- “workweek schedule” that is as key to the integrity of AB 60 as anything else in here.

We worked out a compromise where we said, you know, “Yes, some people may want to work 10 hours, or, okay, 12 hours maybe, but there’s a tradeoff and there’s a guarantee in exchange for that.”

Thank you very much.

COMMISSIONER DOMBROWSKI: I have a quick question. On the example we talked about, of this make-up time, if you have an alternative work schedule, four 10’s, typically Monday through Thursday, and you can’t work Monday and want to work Friday, what’s your take on that?

MR. HOLOBER: Well, I don’t think the bill
really allows that, because, first of all, this was done
mainly to accommodate someone who works five days a week,
okay, that wants to take a half-day off and then would
work some extra day -- time on the other days. So,
somebody in your situation already has voted for
something that gives them three days off each week. Now,
if an employer really wants to accommodate that -- first
of all, I think an employer who’s trying to do what’s
right for the workers can create an alternative workweek
that would allow exactly that, by saying, “Folks, we want
you to vote on a schedule that is 10 hours a day, five
days a week, Monday through Friday, and each week, you
tell us what days you want to work.” That takes care of
that problem. If the worker has the right to determine
their schedule each week, and change their schedule each
week, that employer has complied with AB 60 and you’ve
got the best of all possible worlds, total flexibility.

I think the problem here is that, you know, the
testimony I heard is, “Well, we want one side of that,
which is, yeah, we want everybody to work Monday through
Thursday and have them vote for that, okay, but not give
them the flexibility to say, you know, ‘I want to work
Friday this week and Thursday next week and Friday the
following week.’”
COMMISSIONER DOMBROWSKI: I don’t think you can plan a scheduling system that way, first off. But --

MR. HOLOBER: I agree.

COMMISSIONER DOMBROWSKI: -- I’d disagree on that point.

MR. HOLOBER: No, I agree, for some industries it wouldn’t work.

COMMISSIONER DOMBROWSKI: But the -- but it seems to me, if we don’t allow for the employee to do some of that make-up time, the employee just loses those earnings for that week, and I don’t think they come out very well because of that.

MR. HOLOBER: You’re talking about somebody who’s got a three-day weekend every week.

COMMISSIONER DOMBROWSKI: Right. No, I mean -- but they’re losing -- if they couldn’t work Monday, they lost 10 hours of work that day, and they can’t make it up, they don’t get paid for that day.

MR. HOLOBER: Well, what they could, first of all, do is they could work up to 11 hours on the other days. The bill allows that. So, they could take 4 hours off on Monday, work 11 Tuesday --

COMMISSIONER DOMBROWSKI: No, if they have --

MR. HOLOBER: They could take 3 hours off from
work.

COMMISSIONER DOMBROWSKI: They could make up 3 of them --

MR. HOLOBER: That’s right, yeah.

COMMISSIONER DOMBROWSKI: -- out of the 10. They still miss -- they still lose out on 7 hours of pay, then. How is that good for the employee?

COMMISSIONER BROAD: Well, I do think they get to work up to 8 hours without overtime on another day.

COMMISSIONER DOMBROWSKI: So, they’d have to -- you’d have to juggle it around and work 3 hours on --

COMMISSIONER BROAD: I think so.

COMMISSIONER DOMBROWSKI: Okay.

COMMISSIONER BROAD: Mr. Chairman, can I just make a request that the staff make, as part of our record, the letter to the Journal referred to by Mr. Holober.

COMMISSIONER CENTER: Yes, it will be.

MR. HOLOBER: Great. Thank you very much.

COMMISSIONER CENTER: Thank you.

With that, we’re going to take our break. It is now twenty till one. Let’s come back at ten after one and start the healthcare industry.

(Thereupon, at 12:42 p.m., the public
hearing was recessed for lunch.)

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A F T E R N O O N   S E S S I O N

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(Time noted: 1:19 p.m.)

COMMISSIONER CENTER: Good afternoon. We have a quorum, so we’ll continue our testimony. We’ll go now to the healthcare industry that did not come up to testify on the other nursing issue.

And I’ll bring up, first, the two ladies from Mad River Community Hospital, Patricia and Sandy Rock.

MS. PRATOOMRATANA: Hi. Patrice, again.

I am a licensed registered respiratory
therapist.

COMMISSIONER CENTER: You need to state your full name again for the record.

MS. PRATOOMRATANA: Patrice Pratoomratana.

COMMISSIONER CENTER: Thank you.

MS. PRATOOMRATANA: Mad River Hospital in Arcata. And I’m a licensed registered respiratory therapist.

I wanted to continue where I left off.

The main thing we would like to ask for is just a choice. We need some options. We feel like we’re pretty much being forced to either go to 8-hour shifts, or, if we have to stay and get paid time and a half, which we would love -- but we like where we work, we like our hospital. A lot of hospitals are so tight right now, with capitation and having no money, they can’t afford to pay the time and a half. We want the option to waive the time and a half. We just want a choice.

We're used to living in a democracy. We don’t feel good about being forced, and that’s what it’s -- it’s pushing us into the corner. And we -- I know a lot of hospitals will probably fold. They will close their doors. People will be out of a lot of work. Patients will not get the care that they need.
I live in a very small community, but the hospital is very important. And if the hospital closes, it would be a pretty sad state of affairs. A lot of people would lose their job.

We just want a choice. We want an option. We want to be able to waive time and a half, if that’s what we want to do. And that’s what a lot of us would like to do to stay where we are. We enjoy what we do, where we are, the patients we care for.

The other thing that really bothers me more, on a personal note, is, with alternative workweek schedules, it affords people, spouses, to work, both work full-time and not have to use childcare or sitters. This really bothers me. If I had to go to 8-hour shifts and my husband did too, I’d have to start to put my kids in childcare or daycare, and this is directly affecting our future. I don’t want to have somebody else raising my kids for me. This is very personal topic, but I think it is very important.

Like I said, the children are our future, and if I have to start putting my kids in childcare or sitters, it makes me very upset, and I don’t think my children will be raised and be as healthy and stable as they are being raised by me and my husband. And that’s a very big
We would just like to be exempt. Hospital workers, healthcare professionals, are used to working 12-hour shifts. And actually, the patients get better care, better continuity of care.

Like I said before, we need those three, four days off a week just to regroup. It’s very stressful, what we do. We’d like to be considered as professionals. And my hospitals, nurses, respiratory therapists, allied medical professionals, they work on 12-hour shifts, and it works. It works really well. The patients get better care. The staff is a lot -- they’re better able to deal with life and death on a daily basis when they’re at work. It affords us the time to regroup and recuperate and then go back to work with a clear mind and being rested and deal with the stresses we have to deal with on a daily basis.

So, I would just like to be able to ask to be exempt. And just give us an option, just sign a simple waiver that says we don’t want the time and a half. That would make a huge difference, and I think it would probably save a lot of hospitals -- a lot of employees from losing their jobs, a lot of hospitals from closing their doors.
Thank you.

COMMISSIONER CENTER: Thank you.

MS. ROCK: Good morning -- good afternoon. My name is Sandy Rock. I work at Mad River Community Hospital also.

And continuity of patient care is of our utmost -- what is important. But I’m going to speak on a personal level. I’m a full-time graduate student. And if I have to go to 8-hour shifts, I can’t finish school. I’ve put a lot of time, effort, and money into finishing my education. And if I can’t do it, then I’m out a lot. And so, I would prefer to have the choice to work a 12-hour shift so I can finish school and go on with my -- finish my degree.

Thank you.

COMMISSIONER CENTER: Thank you.

Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

Linda Hayes.

MS. HAYES: My name is Linda Hayes. I’m a critical care registered nurse. I work in a small hospital in north California. And these changes are going to affect all hospitals, small hospitals
especially, as they were just talking about.

I do staffing for my critical care unit. And we do -- well, I have some things I need to directly address here in the draft interim wage order.

One, as the gentleman from CNA was talking about, regularly scheduled workweek, what does that really mean? And, you know, we work flexible -- I mean, we don’t work Monday, Tuesday, Wednesday, or Wednesday, Thursday, Friday. We work the hours we need to work to cover the staffing to cover our unit. Sometimes, if the census is real high, people may work extra, or if the census is low on Monday and it goes up to a full unit on Friday, people that were off on Monday will offer to work on Friday. These things, you know, really affect how we take care of our patients.

The second thing I want to address is, I really am bothered, and I was before -- I’m still bothered by the concept that registered nurses are not professionals. The rules for being a professional are that the work is -- I do earn a salary well over two times the minimum wage. And by the way, I figured it up real quick. That is $26,700, approximately, a year, if you’re working 8-hour shifts 40 hours a week. I work 36 hours a week, so I’m not sure where that puts me in there.
I do earn over minimum wage. My job is intellectual. It requires an exercise of discretion and independent judgment. I am licensed by the State of California and certified by a national organization. And I work in an occupation that used to be commonly recognized as a learned profession. And I work as a professional 100 percent of the time when I am at work.

So, it’s -- that’s been there. It bothered me before, and, like I said, it still bothers me.

One thing that I think needs to really be addressed is Section (C). And it talks about full-time employment, and it sets it at 40 hours per week. I work 36 hours a week. What does that do? All my co-workers work 36 hours a week. We have taken this option to work 36 hours a week. If we need extra money, we can pick an extra 4 hours. But it’s something that does need to be addressed.

So -- and that’s something that I think needs to be negotiated between employer and employee. You know, it’s not something that really needs to be defined by the state.

Section 7, Part (A), the option of belonging to a union should be a decision made by an employee group, not mandated by the state. And that’s what this does.
It says if I want to work my 12-hour shifts, 36 hours a week, I have to join a union.

COMMISSIONER CENTER: That’s not true.

MS. HAYES: California already has a critical experienced nurse shortage. Everybody knows that. They even are doing laws forcing schools into letting more nurses in. But these are new graduates; they aren’t going to be out there for four or five years.

Excuse me.

The experienced nurses in California feel 12-hour shifts are a benefit. They will leave. I will leave. I won’t work 8-hour shifts. My little $60,000 a year doesn’t mean much in taxes, but when you’re looking at healthcare in California, if you lose your experienced people, who’s going to train these new ones coming? It just -- this whole thing is going to take healthcare in California and destroy it.

And we keep talking about how important it is that people get healthcare, how important it is that they receive good healthcare, and yet we’re taking something and it’s just going to destroy it in this state.

The only other thing I have to say is, the whole thing kind of smacks of punishing the workers in the state that earn more money by putting them in the same
class as workers that aren’t able to think for themselves. I think, as a professional, I should be able to negotiate with my employer for the hours I want to work, the days I want to work, when I get paid overtime, and when I’m off.

Thank you.

COMMISSIONER CENTER: You’re -- are you currently working in 12-hour shifts?

MS. HAYES: I am currently working 12 -- have been, for about fifteen years.

COMMISSIONER CENTER: And you understand that is in effect till July 1st in your nursing industry?

MS. HAYES: I realize that. But if I have to put up my house for sale, I have to do it soon.

COMMISSIONER CENTER: And --

MS. HAYES: I will leave the state. I mean, it’s -- it’s not an option with me, because I won’t join a union and I won’t work five days a week.

COMMISSIONER CENTER: But, for your 12-hour shifts, you don’t have to be part of a union to work that alternative workweek, as long as you elect that.


COMMISSIONER CENTER: Now, what we’re doing
here, we’re on the interim blank order. On your
industry, we’re going to have further inquiries and a
hearing, and we will decide, the Commission, whether to
extend that exemption or not. It won’t be that you’ll be
required to join unions; it’ll be whether it is
beneficial to the employees. We have not -- we haven’t
even gone their yet. We’re just doing the interim blank
order, which really doesn’t affect you at all. It’s --

MS. HAYES: I realize this, but at the same
time, July is five months away. You know, people need to
make plans. My staff asks me every time I do the
schedule. I’m working on, you know, vacation schedules.
And they said, “Well, what do we -- you know, where are
we going?” And I go, “I don’t know. I read everything
out there, I’ve listened, I don’t know where we’re
going.” And it’s like nobody can plan. Nobody knows
what’s going to happen with their lives. It’s
disrupting.

At the moment, we’re going, essentially, week by
week. But, you know, we -- people need to make plans.
You’re talking a large industry in this state, a well-
paid industry in this state, and something that’s real
important to the people of the state. And they need to
have some answers.
COMMISSIONER CENTER: Thank you.

COMMISSIONER DOMBROWSKI: I would -- I have a question. What would your reaction be to some kind of procedure that allows you, similar to some of these other -- where you could hold elections for up to 12 hours within a 40-hour workweek?

MS. HAYES: I have no problem with that. We had done that years ago, you know, when we went to the 12-hour shifts where I’m working at now. And we had discussed it and worked it out and had elections among the employees, and opted to do it. In fact, I don’t think any employee voted against it at the time.

And that’s not a problem. Our problem is, is right now we’re up in the air and the hospitals are up in the air, because there are so many things that are so set in here. “Regularly scheduled alternative work schedule,” you know, that’s a term that you can take literally, meaning, you know, you’re scheduled every Monday, Tuesday, Wednesday, and if you work on Thursday because the census is high, I have to pay you overtime, those kind of things. It’s -- there are some definitions out there that might work well for an 8-hour-day, five-day-a-week job at McDonald’s, but they do not work in the healthcare industry. And it needs to be looked at in
that way.

COMMISSIONER CENTER: Thank you.

Linda Hayes. Oh. I’m really good at these cards.

Carol Mantell -- Mantell.

How about Kimberly Martin Pickard?

MS. MANTELL: She had to leave.

COMMISSIONER CENTER: Amy Meier, is she still here?

And Pamela Broderson -- if I can get a few people up here.

Go ahead, ma’am.

MS. MANTELL: Good afternoon.

COMMISSIONER CENTER: Good afternoon.

MS. MANTELL: My name is Carol Mantell, and I’m a professional registered nurse. I work in the intensive care and neuroscience intensive care at John Muir Medical Center in Walnut Creek. I maintain specialty certification in my area of critical care. And I will be very brief.

I just want to name a couple of problems or difficulties that will be incurred by AB 60 when the exempt -- well, when the grace period, as we’re calling it at our hospital, is finished in July, when we would...
have to go to 8-hour shifts.

We started our 12-hour shifts by a vote from our employees. And we have a combination of both 8’s and 12’s in my unit, and it’s an option. If you want to work 12-hour shifts, then you choose a 12-hour day to be your workday. If you would prefer to work an 8-hour schedule, then they -- then that’s what they choose to be their workday. Anything over 12 hours for the 12-hour nurses is double time. Anything over 8 hours for the 8-hour nurses is time and a half, and then double time after 12, like normal.

What we really appreciate our employer doing for us is allowing us to work the 12-hour shifts. We approached them and said that, you know, we’re having a nursing shortage, we need people to come out of the home and into the workplace, and if we can offer 12-hour shifts, we think more people will be able to come and work in a full-time status. If 12-hour shifts are not available to the nurse in my unit, several of them will have to give up their full-time status and drop back to part-time because they cannot be pulled out of their homes five days a week. So, they will lose pay, they will lose benefits, and then the hospital will lose the professional nurses that they, you know, need to take
care of their patients. So, it’s a double-edged sword, and we’re hopeful that we can get an exemption.

Working a compressed workweek has been beneficial to everybody in my unit. The majority of us have small children. It allows us to go to field trips and have Girl Scout troops and do all those things that a lot of the people that work full-time, or a full-time 8-hour shift, cannot do. And working a compressed workweek, three 12’s, gives us the extra days off to attend to our families in the manner that we like to do.

My husband is also a registered nurse. He works 12-hour shifts. He works in the field of psychiatry. And our schedule allows us to maintain the care of our children. No one else has to -- we don’t have to pay for childcare, nobody else has to come into our home, our children are cared for by us, which is very important.

We’ve heard rumors, and I’m not sure if I can ask for clarification about this, that there is an exemption that’s being considered or has been made for union hospitals to still have the availability to vote on working a 12-hour schedule without being paid overtime for the last 4 hours. And it’s a bit ironic, because the facility where I work, we’ve merged with a union hospital. Our campus is non-union, our sister campus is
union. So, the nurses at the sister campus, if what I believe is true, will be able to work 12-hour shifts, and us, who work for the same company, will not be able to work 12-hour shifts without being paid overtime. And I’m not quite sure if that’s hearsay or if that’s -- that’s actual fact.

COMMISSIONER CENTER: That’s the law, if the collective bargaining agreement -- their collective bargaining agreement will cover overtime. But this depends on what the Commission decides before July 1st --

MS. MANTELL: Right.

COMMISSIONER CENTER: -- whether you can continue your 12-hour shifts or not.

MS. MANTELL: Right.

Our biggest concern right now is all the hospitals in the state and in the country right now are experiencing many, many patients, sicker patients, and fewer resources, fewer nurses and fewer respiratory therapists. And working a compressed workweek attracts people to come to those facilities and come to our facility and help us to deliver quality care to our patients. And we’re hoping that we’ll be able to be exempt and continue to do that.

I really appreciate this opportunity. I know
that the staff at my hospital is -- they’re very nervous because they -- we’re looking at possibly restructuring 80 employees that I work with, in just my department, trying to figure out, “Now, who’s going to work nights, who’s going to work PMs, and who’s going to work days?” Right now, we have, you know, everyone set into their little niche. And do we go back and draw straws and figure out who’s going to work what shift? So, they’d really like answers, and the sooner the better, if possible.

So, I really appreciate your time and consideration. I ask that the Commission consider exemptions to be made to allow healthcare employers to allow their employees flexible scheduling opportunities, including shifts up to 12 hours in length at straight pay. It’s what we had elected to do. We voted, we signed a waiver for overtime, and it worked out really well.

So, I appreciate your time. Thank you.

COMMISSIONER CENTER: Commissioner Broad?

COMMISSIONER BROAD: Yeah. I have a couple of questions.

You went from 8-hour days to three 12-hour days, is that correct, with no loss of pay?
MS. MANTELL: I went -- let’s see. When we first initiated 12-hour shifts in my unit, it was approximately ten years ago. And I went from full-time, 8-hour -- I actually worked night shift at the time -- to full-time, 12-hour night shift, three 12’s. So, I went from 8-hour night shift to 12-hour night shift.

COMMISSIONER BROAD: Okay. So, you went from 40 hours --

MS. MANTELL: Right.

COMMISSIONER BROAD: -- to 36 hours.

MS. MANTELL: That’s correct.

COMMISSIONER BROAD: But at the same pay.

MS. MANTELL: My pay is hourly. So, I did have 4 hours less of pay. But I did it completely voluntarily to allow me to have the extra time with my family. My employer did not approach me about working 12-hour shifts. As a matter of fact, I was on a committee to approach our administration to please allow us to work the 12-hour shifts.

So, yes, we work a 36-hour workweek, and that is considered a full-time status with full-time benefits.

COMMISSIONER BROAD: Okay. Now, my second question is, what classifications of workers in your hospital work 12-hour shifts?
MS. MANTELL: We have respiratory therapists that work 12-hour shifts, we have registered nurses in our critical care areas and on a few of the med-surg floors that work 12-hour shifts, and in the birth center and in the intensive care nursery --

COMMISSIONER BROAD: Okay.

MS. MANTELL: -- we have nurses.

COMMISSIONER BROAD: Do pharmacists work 12-hour shifts?

MS. MANTELL: I don’t believe so, but I’m -- I’m not -- I’m not sure.

COMMISSIONER BROAD: Do pharmacists in your hospital -- do you notice them having direct patient interaction with patients?

MS. MANTELL: Well, like I said before, I primarily night shift, so if they were going to have -- and I also work in a critical care unit, and the majority of my patients are comatose, so I don’t see them interacting with them.

(Laughter)

COMMISSIONER BROAD: Okay.

MS. MANTELL: But I don’t -- I don’t believe that they -- I don’t believe that they do that as much. A lot of the communication is from the nurses to the
COMMISSIONER BROAD: Okay. Now, are there any non-direct-patient-care personnel working 12-hour shifts at your facility?

MS. MANTELL: No. Currently we have some unit secretaries that work a 10-hour shift that they elected to do, and -- but otherwise, they work -- I believe the unit secretaries in the rest of the hospital work 8-hour shifts.

COMMISSIONER BROAD: And -- I’m sorry -- where did you say you work?

MS. MANTELL: I work in the -- I work at John Muir Medical Center in Walnut Creek, and we’ve recently merged with Mount Diablo Medical Center in Concord.

COMMISSIONER BROAD: Thank you.

MS. MANTELL: Thanks.

COMMISSIONER CENTER: Thank you. And just to speed things up, especially for the registered nurses, we will consider your order, which will expire in July, to decide whether we’re going to continue the 12-hour exemption or not. So, unless you have a comment on the regulations themselves, if you’d just like not duplicate testimony and just introduce yourself and -- to speed it up -- if you could.
So, you’re next, ma’am.

MS. MEIER: My name is Amy Meier, and I have flown up here from San Diego, representing Scripps Memorial Hospital, specifically in La Jolla, where I am employed, and largely Scripps Memorial Hospital system. It is a multi-hospital system consisting of six hospitals.

I am up here, basically, with the two people who have come before me, with the same statements. We are desperately searching for a way to find the ability to have a choice to work our 12-hour shifts.

Specifically, on my unit, we have been working 12-hour shifts for twelve years. I have only been there for -- you know, for a short -- I haven’t been there the entire time. When that happened, in direct response to what you were asking, people went from a 40-hour workweek to a 36-hour workweek voluntarily, for full-time employees. They did not take a pay cut. You know, the pay was adjusted so that people did not lose money because we voluntarily wanted to do this, but the hospital compensated for the loss of the 4 hours.

What has happened now is our hospital cannot afford, in this -- in today’s healthcare, you know, economy, we cannot afford to pay employees time and a
half and stay at the current rate that we are paying them for 12 hours without adjusting and fluctuating the base rate of pay. We -- all of us on our unit want to work 12 hours.

Who works 12-hour -- the 12-hour schedules on our unit? Everyone, unit secretaries, our service partners, our OR techs. And I am, like I said, on labor and delivery. And people have voluntarily wanted to work that. We do have some service partners who, for family and other obligations, have decided to work 10-hour shifts. We have other units within this hospital that work 8-hour shifts. Some floors work 12- and 8-hour shifts, depending on the employees’ needs. Our hospital has generally been very accommodating, so that all aspects of life are considered, to keep our skilled nursing professionals within the hospital.

Just like she was saying, we’re having a shortage. And whatever we can do to help employees stay happy and provide for quality care to our patients, that’s what we’re trying to do.

And all we’re asking is to have the choice, whether it’s a vote, whether it is secret-ballot vote, I mean, just give the employees a choice. Our hospital is willing to, you know -- trying to accommodate them in any
way they can, but financially, they are under constraints as well.

We are looking at losing a lot of staff if July 1st, if we go to 8 hours. And this is a reality. People have already said, “Yes, it’s four months off,” but they are making plans. We have currently, just on my unit alone, lost four skilled labor and delivery nurses who have moved out of state because they do not wish to even deal with the problem of maybe having to go to an 8-hour schedule. They are looking for work other places. If nurses continue to leave the state and continue to leave the hospital, we’re going to have a real problem. And people -- the people who are going to be affected are the citizens of the state, the people who go into the hospitals, women who are having the babies. You know, it’s just -- I think the issue needs to be really considered, to give us an option.

COMMISSIONER CENTER: Thank you.

Pamela Broderson, Vivian Miller, Barbara Blake, Jeanette Mason, Dawn Dingwell, Deborah Portela, Jay Allen.

MS. DINGWELL: Good afternoon, Chairman Center and commissioners. My name is Dawn Dingwell, and I am the Director of Legislative Affairs for the California
Association of Health Facilities. CAHF is a nonprofit professional association representing more than 1,500 licensed long-term care health facilities in California. Our members included skilled nursing facilities for the chronically ill or aged, subacute care facilities focusing on intensive rehabilitation and post-surgical recovery for residents of all ages, facilities for the developmentally disabled and the mentally ill, as well as assisted living facilities for the elderly. Our facilities range from home settings with an average of six beds to facilities serving more than 100 residents.

We’re here today to ensure that you understand that the different needs of our patients and our staff and our facilities are distinguished from a hospital setting or in-home care services. I have with me two members of our association who are available to provide their expertise and personal experience on these issues and answer any questions you may have. But before I turn the mike over to them, I would like to briefly summarize some of our practical realities that are facing our industry and what we need the Commission to address in the new wage order.

Long-term care requires extended shifts and flexible work schedules to meet patient and staffing
needs. I know we’ve heard a lot today, and you’ve heard in prior hearings, about the importance of continuity of care, so I won’t spend a lot of time on that issue. But I will just briefly state that flexibility in scheduling employees in a long-term care setting is essential to provide continuity of care to patients requiring 24-hour supervision and nursing care.

Continuity of care is also important to our residents who are more comfortable having their personal, intimate care needs addressed by the same person throughout the day. Continuity in staffing is also critical to patients who are easily confused and agitated in our long-term care settings, including folks with Alzheimer’s disease or mental illness.

We also need flexibility in our industry to meet the staffing demands. We are in a serious staffing and funding in our industry, and flexibility is the only thing that’s allowing us to meet our current staffing needs. Unlike a lot of the other healthcare providers you’ve heard from, long-term care facilities rely mostly on MediCal to pay for patient care. Because MediCal does not fully cover the cost of care, long-term care facilities are severely under-funded. Over 119 facilities in California are currently in bankruptcy
proceedings.

The problem is, is that the MediCal system does not adequately account for serious increases in overtime pay. Our providers are working within tight budgets to carefully balance staff work hours with needed patient care, but the inadequate MediCal rates keep wages low.

Providing care to long-term care residents is, of course, physically and emotionally demanding work. And in our current full employment economy, we’re facing, again, a very serious staffing shortage. Our turnover rate is over 70 percent. Over 10 percent of staffing jobs are unfilled in our facilities statewide, and the average facility is short at least two full-time employees. It’s estimated that we need over 30,000 workers to fill our current staffing requirements.

This is not a temporary crisis. We’ve been experiencing it for many years. And although we are hopeful, we do not see any end to the funding or staffing crisis in the near future. Accordingly, we absolutely require flexibility in scheduling to allow facilities to fill staffing gaps by scheduling the limited number of employees available for longer periods, to hire -- allow facilities to hire workers who may only be available through flexible staffing arrangements. And we’ve heard
several folks mention their own personal needs today.

But, again, I’ll touch on a few of those.

Working moms and parents rely on flexible work schedules to get paid for full workweeks and only work a limited number of days. It’s also easier and more affordable to obtain childcare for three days rather than five days. Weekend workers or students who work two 16-hour shifts or three 12’s find that schedule to be -- to meet their needs in our -- in our industry. And also, a lot of our workers have second jobs. Many of our workers also rely on public transportation and have commutes from one and a half to two hours, especially in the Los Angeles area. And the longer shifts allow them to put in more hours, but less days.

We also require flexibility to hire live-in staff or sleep-over staff that work 24-hour shifts.

We have submitted written testimony that enumerates our recommendations specifically in the draft interim wage order. And we’ve recommended some specific changes and language. I’m not going to go into that now, in consideration of time. And I’d like to let our members speak about their own practical experience, but I would like to cover, briefly, a couple of key issues.

COMMISSIONER CENTER: Could you -- we’re trying
to enforce a three-minute limit here too, so be brief, if you could.


Any exemption that is created should be industry-based and not based on individual employee status. In the past, the IWC has always recognized the healthcare industry as a whole under Wage Order 5. And we believe that this type of approach makes sense.

We have heard some concerns that the Commission may be considering exemptions that recognize only licensed staff in a healthcare setting, and this type of approach would fail to recognize the current model of long-term care delivery that’s been in place for the last twenty-five years. It’s most important to understand that, unlike hospitals, primary caregivers in long-term care facilities are frequently unlicensed or certified staff. In nursing facilities, certified nursing assistants provide the bulk of direct care, including bathing, toileting, feeding, and other personal care needs, and assistance with the activities of daily living. In facilities for the developmentally disabled, direct care staff perform similar services and are specially trained --

COMMISSIONER CENTER: Excuse me. You’ll have to
wrap it up here pretty quickly.

MS. DINGWELL: Thank you. -- but they are not certified or licensed.

And now I’d like to ask our members to go ahead.

COMMISSIONER CENTER: Thank you.

MS. PORTELA: Hi. My name is Debbie Portela, and I own and operate a 138-bed facility in Rancho Cordova. And I appreciate you giving us the opportunity to talk to you today.

As Dawn mentioned, we -- we are in a staffing crisis right now. I’ve been an administrator for sixteen years in this area, and during that time I don’t think there’s been a time that -- we need more flexibility in being able to attract workers to our industry. Our industry has been under extreme attack by -- by different -- you know, around quality care and staffing levels.

And in the Governor’s budget now, we already have increased staffing requirements that went into effect January 1st. And the day that those staffing requirements went into effect, we could not meet them because the worker is not even out there to hire.

And we’re trying to look at innovative ways to attract people to our industry, which largely employs women and largely employs single women who are trying to
raise kids, and in doing that, at a wage of -- the
licensed nurses make great wages, but we’re trying to
attract licensed nurses from hospitals that can work 12-
hour shifts. And I’m trying to staff a 24-hour nursing
facility.

The nursing facilities take care of frail, sick
residents now. We aren’t housing little old ladies any
more and just giving them meals. We’re taking care of
patients that need continuous nursing assessments. We’re
handling all types of complex nursing issues. And we
have to staff our hospitals 24 hours a day with licensed
help that -- that make up registered nurses and licensed
nurses and certified nursing assistants. The licensed
portion of our staff is about 25 percent of that direct
care staff. The other 75 percent are certified nursing
assistants. But we still have to maintain that staff 24
hours a day.

And in order to attract the licensed nurses that
we need, it’s -- we need to have -- be able to offer them
12-hour shifts. We’ve never been able to do that before,
and so it’s hard to offer 10-hour shifts to licensed
nurses. Then you’re stuck with 4 hours at the end of the
day that -- who are you going to get to work a 4-hour
shift, you know?
So, we’re just asking for you to consider our industry when you’re looking at this legislation, and try to keep us in mind, because we’re trying to provide the most quality care that we can provide in our industry, and we need that flexibility in order to do that. And our -- our nurses have asked us about 12-hour shifts, and I have never, in my facility, been able to do that under the current wage order.

CNAs also should be considered as direct healthcare workers. We’re trying to have them be recognized as a professional part of our healthcare delivery system. They take care of the elderly and the infirm, and they’re the ones that are providing the bulk of that direct care work. And we’re trying to get them to get people attracted to that field, where they only can make maybe $8 an hour at a starting wage now in California. Well, if they could work a 10-hour shift, then they could -- and work three days, which many of them only work part-time -- a lot of our shift, they’ll only work -- they can only work three days a week, because maybe they’re going to school, or maybe they’re -- they have their kids.

And so, if we could have flexibility, we wish that -- we feel like it would help us to deliver more
quality care and also attract more workers and give them
the flexibility that they need.

COMMISSIONER CENTER: Thank you.

MR. ALLEN: My name is Jay Allen. I’m the
executive director of RCCA Services, which is an
organization that provides residential supports for
people with developmental disabilities. These facilities
are of a size of, often, over 100 people per home, but
most often usually six people.

And we’re also here to ask for flexibility in
terms of scheduling for these homes. The people that
live in these homes need quite a bit of support to
successfully get through the day. And our direct care
staff, who are not licensed -- licensed or certified,
responsible for working with these folks and meeting
their needs during the day, since the law has changed, we
have been forced, due to the under-funding currently by
the state, to eliminate all of our flexibility that we’ve
had with scheduling. We have had people who are working
12-hour shifts, three days a week, and also staff members
that were working two 16-hour days a week. And that has
allowed for school commitments, childcare, and a variety
of other commitments that our staff have. And we’ve had
to eliminate that, and that has impacted the employees.
Not only are they not able to schedule more hours, but having worked two 16-hour days, or 32 hours a week or 36, they’re eligible for health insurance. And if they’re not able to pick up the additional hours, they lose that eligibility. And it’s unfortunate.

We are in a staffing crisis; there’s no question about it. And we need as much flexibility as we can in order to meet the needs of the developmentally disabled in the community.

Thank you for your consideration.

COMMISSIONER CENTER: Thank you.

Any questions?

COMMISSIONER BROAD: How many of your employees were working 16-hour days?

MR. ALLEN: I would estimate that we have probably a handful, probably not more than ten.

COMMISSIONER BROAD: And that never raised an issue of you -- of undue fatigue or patient care consequences that were negative?

MR. ALLEN: No. No. As I say, most of the homes -- in fact, all of the ones that I work with, six people live in a home in the community, and it’s a -- it’s a home. And it is very intensive during particular times of the day. If you think of yourself and what care
you would need if you needed that kind of support, during
the morning hours, in terms of bathing and showering and
getting dressed and fed, that is a very intensive time of
day. Other times, it’s not as intensive. So, it has not
raised an issue.

In fact, just the opposite; the consistency and
the care that you can give, if you’re not changing staff,
make a big difference with these folks. Their needs are
very individualized. And since most of them are
nonverbal, you need somebody who’s very familiar to
provide the service to them.

COMMISSIONER BROAD: Do they have -- I mean,
when you’re saying they work 16 hours a day, is that
continuously, without breaks?

MR. ALLEN: No.

COMMISSIONER BROAD: How do they do that?

MR. ALLEN: No, they are able to -- well, most
of the time, there are two people that work in these six-
person homes, and there are periods of inactivity where
they can get away and have a break. We have -- we look
very closely at the quality of our services, and we have
seen just the opposite of what you’re suggesting. We
have seen that our quality is better when we have
consistent staff members. And if we have more part-time
people or people working less hours, it hurts our
quality.
So, I appreciate what you’re saying, and it’s a
potential issue, but we just simply haven’t seen it.
COMMISSIONER BROAD: Thank you.
COMMISSIONER CENTER: Thank you.
Kate Gattuso, Jack McGee, Kerry Rodriguez
Messer, Marianne Ward.
Kate Gattuso, I think, is first.
MS. GATTUSO: Hello.
COMMISSIONER CENTER: Hi.
MS. GATTUSO: Kate Gattuso. I work at Stanford
University Hospital and San Mateo County General
Hospital. I’m a respiratory therapist, and I’ve been a
respiratory therapist for 22 years, working in hospitals
and home care.
And we need the flexibility that everyone else
has said, to staff our -- our hospitals and our care
centers. And at Stanford, we work 8-, 10-, and 12-hour
shifts within the Respiratory Therapy Department. We
need that flexibility to cover our needs.
That’s all.
COMMISSIONER CENTER: Thank you.
Jack McGee.
MR. McGEE: Thank you, Chair Center, commissioners. My name is Jack McGee. I am a respiratory care practitioner. I’m here today to speak in favor of 12-hour shifts, and I’ve been working this schedule three days a week for the past eight years at Stanford University Hospital.

Many of my colleagues and I have previously written the IWC, and no longer being able to work 12 hours will have dire consequences on our personal lives. With these letters already on file, I assure you I will try to avoid being repetitious.

Still, I must say, the comments by Richard Simmons, representing the CHA, at the December meeting describing 12-hour shifts as the first and foremost issue before this Commission resonate well with me.

Primarily, I came here today to raise the bar and broaden the scope of the issues before the Commission, as I see them. If I may ask the indulgence of this body, I believe I can identify these larger issues in the next two minutes.

Having read the minutes for the prior three meetings, I was motivated by Commissioner Broad’s observation at the December meeting that the Commission had only heard from a small segment of workers in
healthcare. This gives me pause, for as I have stated, many individuals have already provided written comments to the Commission. And I wondered aloud what became of our letters. Does the Commission not realize we willingly work the hours we do?

I have a keen awareness of the difficult task before the IWC. And even so, it strikes me that your diamond in the rough has only one facet, wages. In the real world, people work for and find gratification in their work for a constellation of reasons. The rich life extends well beyond the workplace. My government, my church, advocacy groups, the media, and my conscience fill me with a sense of what I as a citizen should be doing. I aim to spend quality and quantity time with my children in order to raise responsible adults and avert youth crime. I should be volunteering my time. My alternative work schedule allows me to participate in programs sponsored by the Boy Scouts of America, for example.

The reality of living in San Jose is worsening traffic conditions in the year 2000. “Leave the car at home” is a familiar mantra in our community. With fewer days on the job, my car can stay in the garage more often. I carpool whenever possible, usually three days
each week. In my case, acting socially responsible depends on working 12-hour shifts.

I raise these points because they comprise the strong undercurrent for this first and foremost issue. I believe the highest undertaking for government is to smooth the path for citizens to uphold lofty ideals. I think it is wrong for any arm of the government to create obstacles or otherwise work at cross-purposes to achieving such goals. Restricting my ability to work a compressed workweek, in my view, clearly conflicts with the larger good in these other realms.

I would also like to resolve a question. Having read the memorandum of December 23rd from the Labor Commissioner, I am left wondering whether the IWC has the authority to extend 12-hour exemptions beyond July 1st of 2000. An answer to this question is vital for all healthcare shift workers. If the IWC is indeed powerless, there are only three lines of recourse: through the Legislature, change employment to a government health facility, and collective bargaining, although, as you heard, one individual is going to move out of state.

Your attention to this question and mindfulness of the broader ramifications stemming from AB 60 is
appreciated. Thank you for your time and courtesy.

COMMISSIONER CENTER: Okay. To answer your question on the memo, that was written by the Labor Commissioner, not by the Industrial Welfare Commission, and the direction from our legal counsel, we would have authority to extend 12-hour shifts.

MR. McGEE: I’m heartened to hear that.

COMMISSIONER CENTER: And people moving out of state, they probably have unions there too.

With that, Kerry Rodriguez Messer.

MS. MESSER: Right here.

COMMISSIONER CENTER: Yeah.

MS. MESSER: Hi. My name is Kerry Rodriguez Messer, and I represent the California Association for Health Services at Home. I want to thank you for letting us speak to you today, and acknowledge right up front that AB 60 is law. We’re not going to try and overturn that here, but believe that within your powers under dealing with the healthcare industry, that there are some concerns we have that you may be able to address or provide us with some clarification.

Our members are primarily home health agencies, hospices, and home care aid organizations. These members provide nursing and other supportive services in the home
to patients. They range from things like assistance with dressing and grooming to intensive nursing care, for example, critically ill children who are trache-dependent, but because of technology can remain at home.

Unlike other healthcare settings -- because I know you’ve heard from a variety of healthcare practitioners -- in-home care, the relationship is unique in that it is one-on-one. And I think that that is what divides us from the rest of the healthcare settings and makes the continuity of care issue a very valid and real one in the home care setting.

With the discussions, there’s been an assumption that the healthcare industry was taken care of until July. But after speaking to several of the commissioners and doing some research, it only took care of those that were in a hospital setting or that had an alternative work schedule in place prior to 1998. Unfortunately, some of our members did not, and those that did, some abandoned them officially when the new rules came out in 1998, going to a 40-hour workweek.

So, we have a large majority of our members that are now abiding by the 8-hour day rule, or trying to do a 10-hour alternative workweek schedule under the rules of AB 60.
The draft interim wage order, we have a couple questions on. “Alternative workweek schedule,” to us, is very confusing and troubling. When we read the Department of Labor Standards Enforcement memo, we get the impression that perhaps we need to designate days, “You’re going to work 10 hours on Monday, 10 hours on Tuesday,” but nowhere else do we get that guidance. So, we’re wondering, can we just have a schedule that says, “You’re going to work three 10’s, and given that week, you know, those three 10’s may fall on a different day of the week”? And we would appreciate guidance with that.

Also in the draft wage order, you say that employees are permitted to move from one alternative schedule to another. And I’m not sure exactly what kind of flexibility that provides us. So, further guidance on that, whether it can be within the same week, whether they need to do a vote every week if they want to change from one week to the next, to go from one alternative schedule to another.

We’d also like clarification, as many others have said, on the seventh day. Is that consecutive? The Labor Standards Enforcement folks have an opinion, but guidance from you would be great.

The draft wage order also, as I said, fails to
address the healthcare industry. And I understand you’ll be looking at them as a whole later on. We are concerned with what we’re going to do in the interim, though, because, as I said, most of our members do not fall into the crafted-out exemptions that were in AB 60.

I have been asked by members of the Commission and others, “Well, what did you do before 1997?,” and that’s a critical and important question. Well, our members lived in an entirely different world. Home care has changed so dramatically over the past couple years that it’s almost not a valid question.

In 1997, Medicare was completely changed by the Balanced Budget Act. And it’s important to note that home health is paid for -- excuse me -- Medicare pays for 79 percent of home health in the state, so that the changes that made a 20 percent cut in pay were a dramatic change in the way care is delivered. In addition, MediCal pays for 4 percent of all home health in the state. Those reimbursement levels are at the same that they were in 1994. And neither of these two payer sources accounts for overtime.

In 1997, we were not an industry in crisis. In the past two years, 235 home health agencies have closed. This represents 71 percent of the health facilities that
have been closed in the state in the past two years. We went from a high of 1,400 agencies; we now have 880. This is in the face of policy makers trying to implement measures that move people from institutions to the home and community-based settings. On top of all that is the nursing shortage.

I’ve taken up too much time already. I’d rather have you hear from my members. I have a home health provider as well as a hospice provider. We’ll start with Marianne Ward, who is a licensed vocational nurse, and she’s from Interim HealthCare, and then we’ll go to Holly Swiger, who is a registered nurse, and she’s from Vitas Hospice.

MS. WARD: Good afternoon.

Well, in order to honor Chairman Center’s request and not to duplicate my testimony, I’ve rewritten it so that I can be succinct in what I’d like to say. The alternative -- and I am going to address the draft interim wage order, Item 5, alternative workweeks.

In home health, there is nothing regular about a scheduled alternative workweek. Home health is a delivery of care to patients requiring services on a 24-hour-a-day. Their admission to service varies from the time of the day that they come into service with us. And
Kerry had stated, the way the law is written, it does indicate the alternative workday has to be identified as a Monday, Tuesday, Wednesday, Thursday. And in home health, that is not possible.

An example I can give is a patient that gets hospitalized, or has to have surgery. That alternative workday for that particular staff of nurses is null and void. Those people are out of work. We need to place them with other patients. And so, there’s nothing regular in that regard.

It’s an agency or it’s an industry that’s been financially chiseled. Again, Kerry covered that quite well. We used to be able to offer staff flexible hours. And the disruption that the 8-hour workday causes really impacts not only individual lives, as you’ve heard time and time again testified today, but it also affects the disruption in the life of the patients that we’re caring for in their homes.

It impacts our ability to recruit and retain employees and nurses in this particular industry. And, yes, there are labor boards and there are other organizations out of state. It would be great if California could hang onto its professionals here.

And I would also like to invite any member of
this Commission to come and see a 24-hour home health
patient and see how the delivery of care is provided, and
talk to the employees that are providing that care and
get the information firsthand. My employees and my
patients are eager and anxious to testify when and if the
committee should decide that, you know, the healthcare
industry will have a carved-out time to be researched and
reviewed. And I look forward to being a part of that
opportunity.

And thank you so much for your time.

COMMISSIONER CENTER: Thank you.

MS. SWIGER: Hello. My name is Holly Swiger,
and I work for Vitas Healthcare Corporation. We’re a
large provider of hospice services. In fact, we provide
care to over 1,000 people who are dying in California
each day.

I’m extremely concerned about the impact of AB
60. You see, when people are dying, there’s a lot of
change, loss, and confusion that happens in their lives
at this time, both for the patient and the families. And
our goal is provide a compassionate environment with the
greatest continuity of care as possible to kind of smooth
out this very rough time. We address the patient and
family’s needs, both physically, psycho-socially,
spiritually, and we do that with a team of providers.

So, we employ physicians, we employ nurses, social
workers, chaplains, home health aides, homemakers; we
have a cadre of volunteers that work for us.

People want to remain home. And in order for
hospice to assure this, we have our interdisciplinary
team that not only provides visits and manages the care,
but we also then have 24-hour on-call staff, and we also
provide up to 24 hours of shift care when necessary.

The problem is, people don’t die according to
the clock. And if a nurse or social worker or home
health aide or chaplain are out at that bedside, and the
patient is at a point where they’re actively dying, we
don’t want them to look at their watch and say, “My shift
is over; it’s time to go home.” This is extremely
intimate care that occurs when someone is going through
this. And we want staff to be allowed to make the
decision of being able to stay there and then adjust
their workweek as necessary.

When it’s a 24-hour situation, where we have 24-
hour care in, the 12-hour shifts work much better, on
behalf of the patient and families, because, first of
all, again, you only have two different people coming in
there to provide this care, instead of three. And if we
do have the three, we have to change that late at night, and then again early in the morning, disrupting, again, the rest of the patient and family, which is so vital.

I just had a chaplain stop me in the hallway yesterday that said, “What am I going to do? I can’t -- I don’t know how to work this way, now that we have this 8-hour limitation, because I’m supposed to be fitting into the family’s needs, and I can -- you know, I’ve got families that work, and I can only reach them at night. But I may get a call through tonight, or I might not get a call through. If I get a call through, it’s an extra hour. So, do I cut my day back, and then may not get my full amount of pay today, or do I go ahead and just know that I’m going to have that overtime, and therefore cut into the charity care of our other patients?”

With the increased healthcare staffing shortages in California that you’ve heard about all day today, this is a real important perk that we can provide our staff so that they can balance not only the work environment, but their home environment as well.

And so, I really urge you, on behalf of the staff, that not only are they allowed to do that personally, but also be allowed to provide the care that they were called to provide when they come to provide
hospice.

Finally, as a provider of care, I’m very concerned about the overtime cost. For our organization alone, we’re looking at over $600,000 a year as a result of this. And this is very difficult when we are paid a flat rate per day to cover all the costs, labor, medications, durable medical equipment, whatever that patient needs. What I’m concerned is going to happen with hospice providers is that we’ll be forced to decrease the continuity of care, we’ll have to put limits on the charity care that we now provide and are so proud of, or we’ll have to transfer those patients to hospitals, at a time when the patient and family would prefer that they stay at home.

So, to return to overtime after 8 hours in a day creates a great hardship on our patients, family members, staff, and hospice programs. There’s no way to schedule the death of a patient. And many hospice staff members would not fit under our definition of a regularly scheduled alternate schedule. So, we really request that we have a permanent exemption for hospice so that we can provide the care that we need to.

Thank you.
Any questions?
(No response)

COMMISSIONER CENTER: Thank you.

Now Robert Tollen, Melanie Loya, Mary West Piowaty.

Yeah, we need to really reduce testimony because we have a duty to vote on our order here, and if we’re going to make amendments, it make take a while. We can have Andy start enforcing the law here.

MS. PIOWATY: Hi. It is easier to testify earlier in the day; you don’t feel so repetitive.

My name is Mary West Piowaty. I live in Susanville, California, northeastern California, in Lassen County. I’ve been a respiratory therapist for 26 years. I’ve worked 8 hours, 10 hours, 12 hours, and in a rural hospital we work on-call. I’ve worked in 8-bed hospital, 400-bed hospital. I’m presently in Susanville in a 26-bed rural hospital.

Employees in a rural hospital are required to cross-train in multiple departments and must possess a large array of skills. Compensation cannot compete with the large metropolitan hospitals. Reno’s our closest large metropolitan hospital, which is out of state. It’s 90 miles away. Or this rural hospital has trouble
competing with state prisons. We have two in Susanville. So, retention is very difficult in our profession. It’s very difficult to get qualified professionals in rural areas. We use a lot of mid-level caregivers, midwives, family nurse practitioners, and PAs, and it’s very difficult to get physicians, so they fill in.

At Lassen Community Hospital, we -- both the employees and the management -- have liked the 12-hour shifts. It’s been beneficial for staffing needs, stability, and retention. It’s been beneficial for patient continuity and personal and family time off. It’s resolved a lot of our staffing difficulties.

I testified twice here in Sacramento in favor of AB 60 for Wally Knox. The reason I was in favor of daily overtime is that we don’t staff our ancillary departments at night, lab, X-ray, and respiratory. We go on-call. I was a part-time worker. I’d work long days, then be worked some long nights -- never hit 40 hours; therefore, never get compensated. So, yes, I was in favor of it.

But I now ask you to listen to the testimonies and make good judgment for the exceptions and the alternative work schedules. I’m here to ask you to allow us to continue working 12-hour shifts with the waive of overtime after 10. That’s what we’ve been doing. We
like it, and it seems to work for us.

As caregivers, we feel a 12-hour alternative work schedule benefits not only our patients, but our personal lives.

I ask you that you look out for the California worker, especially the female worker, who the majority are in the medical field, is females.

And thank you very much.

COMMISSIONER CENTER: Thank you.

Questions?

(No response)

MS. LOYA: Good afternoon. My name is Melanie Loya. I’m a registered and licensed respiratory care practitioner at Mercy General Hospital here in Sacramento. I’ve been working as a respiratory therapist for 18 years.

In 1988, we willingly pursued and voted for flexible work hours of 12-hour shifts. We did not ask -- the management did not ask us; we asked them. We strongly protest regressing back to 8-hour shifts, mostly for the reasons you guys have already heard today. And I won’t go back into it.

On a personal note, if I go back to 8-hour shifts, I either have to put my daughter in daycare or I
never see my husband. There are people who are going to
school full-time to finish bachelor’s and master’s
degrees that will not be able to finish them if they have
to go back to going to work 8 hours a day, five days a
week.

On another note that may or may not have been
brought up, Sacramento has smog days, smog alert days.
Working 12-hour shifts, we are on the road only three
days a week. We are also on the road before the mass
crush that hits Highway 50 and Interstate 80. We’re off
the road before the mass commute to and from work.

The other thing that was brought up is we work
in a life-and-death situation every day. Christmas Eve
day, we had four Code Blues -- that means cardiac or
respiratory arrests -- before noon. You need those extra
days off a week to help regroup yourself and focus back
on what your life is.

It’s easier for our night shift people to work
three nights a week full-time than to have to do five
nights a week full-time.

In our department, to compensate for the loss of
4 hours a week in the pay period, they have given us a
differential so that we lost no pay. Some hospitals opt
to keep their full-time listing. We actually are listed
as part-time, but we do get paid to compensate for the loss of the pay. We do have shift differentials between the night shift and the day shift to encourage, retain, and recruit seasoned, experienced respiratory therapists.

It has been brought to my attention that no less than four people are threatening to quit if we have to go back to 8-hour shifts. If that happens, a department that is already under-staffed will be greatly affected.

I have a petition here with 100 signatures from respiratory care practitioners at Mercy Healthcare, Sacramento. There’s been another 50 that have been faxed in from other Mercy Healthcare facilities to the Commission. We ask you, we implore you, please let us make the choice to work 12-hour shifts. Please continue for us to be exempt, respiratory care practitioners and other healthcare workers.

Thank you.

COMMISSIONER CENTER: Thank you.

We’ve got Randy Clark, Steve Harvey, Mary Gonzales. And if you don’t have any additional new information, please be very brief.

MR. CLARK: Yes, sir. It’ll be very brief.

My name is Randy Clark. I’m the president of the California Association for Respiratory Care. I’m
also a department manager at a large hospital in Modesto, and I represent 82 licensees at that facility.

As I’ve been hearing, you’ve already heard lots of testimony through the day, and I believe I’ve heard from you that the healthcare industry will be carved out for another discussion at another time. So, my question would be, what is your timetable?

COMMISSIONER CENTER: I don’t think we’ve said that. It was asked if we had the authority to do that. By July 1, we’re looking at the nursing exemption.

MR. CLARK: Okay. Okay. The question would be, at what time would all of us -- which, I guess, there’s 17,400 respiratory care practitioners in this state and 280,000 licensed registered nurses in this state -- when would we know if that exemption’s going beyond July 1 or not?

COMMISSIONER CENTER: Well, when we have a hearing and then -- and vote on it. That’s when we will know.

MR. CLARK: Okay. I guess that was my question, sir. Mr. Chairman, when would that hearing be?

COMMISSIONER CENTER: We have not got to that point. Part of our problem, we have several other industries we have to review too.
MR. CLARK: Okay.

COMMISSIONER CENTER: And if we open up separate wage boards on other industries, we have a lot of things. And we have to sit down with our staff and look at the available schedule. So, we do not know right now.

MR. CLARK: Okay. That concludes my remarks. Thank you.

COMMISSIONER CENTER: Thank you.

MR. HARVEY: Hi. My name is Steve Harvey. I’m a respiratory care practitioner at John Muir Medical Center. And I just want to go on record as saying I represent 50 respiratory care practitioners at my facility that all wish to work 12-hour shifts and want to stay on 12-hour shifts.

Thank you.

COMMISSIONER CENTER: Thank you.

How about Connie Delgado Alvarez, Charles Skoien, Jr., Michael Arnold, Ellen Bair, and Kimberly Martin Pickard?

MS. ALVAREZ: Well, I guess I should go ahead and begin. Hi. I’m Connie Delgado Alvarez, with the California Healthcare Association. And I want to be very brief for you today, since we’ve gone on for a little bit of time.
I first want to support the statements that were made by the advanced practice nurses. And this is a critical area for our hospitals, as they do provide a tremendous support to the whole function of the hospital. And in that regard, we have submitted some draft language for your review. You should have received a copy, I believe, yesterday. And they just -- the main thrust of those -- of those draft -- of that draft language deals with the flexible work arrangements, the advanced practice nurse issue, and the regularly scheduled alternative workweek.

So, I understand we’ll be continuing on with this discussion, so I look forward to working with you in the next two weeks, before I leave.

COMMISSIONER CENTER: Thank you.

Mr. Neff?

MR. ARNOLD: Michael Arnold.

COMMISSIONER CENTER: Oh.

MR. ARNOLD: No problem. Michael Arnold, representing the California Dialysis Council. I’ve passed out suggested changes to the portion of the interim wage order dealing with alternative workweeks. I’m here representing a group of dialysis facilities in the State of California. Dialysis
facilities, obviously, treat dialysis patients. Dialysis patients dialyze three times a week for three or four hours per day. Dialysis facilities have implemented a 12-hour workday so that their patients can be appropriately seen. On Monday, Wednesday, and Friday, a dialysis clinic will open at 6:00 a.m. and, generally speaking, will close 12 hours later, at 6:00 p.m. On Tuesday, Thursday, and Saturday, they’ll open at 9:00 a.m. and then close at 9:00 p.m. And in that way, the staff is happy, the patients are happy, and the dialysis facility can deliver the care most appropriately to the patients.

If -- I guess the entire industry right now needs some guidance from you folks. And everybody has said that. If you really want people to be able to implement a 12-hour day now, you need to say that. If you don’t, that’s fine, but if you do, you need to say that, or else folks aren’t going to do it, because what they worry about is that if they implement a 12-hour day now and they are fair with their employees -- in other words, the employees do not have a reduced take-home pay as a result of the implementation of the 12-hour day -- that if that 12-hour day then goes away on July 1, will the regular rate of hourly pay that they were giving
their employees on a 12-hour then become that which is
used for purposes of calculating overtime after July 1?
So, you need to solve -- you need some people some
guidance here. And until you do, we’re going to be in a
giant upheaval.

Most of the folks in the dialysis industry have
gone back to 8 hours of straight time with 4 hours -- 4
hours of overtime. That’s bad for the employees. The
employees don’t like it because it makes it difficult for
them to calculate their benefits, and also, because if
they move on to some other job, they’re worried that they
will be making that move based upon a lower salary than
they were getting when they were paid pursuant to a
blended rate for the full 12-hour day. It’s bad for the
employers because they have to make all these goofy
calculations that they didn’t have to make when they were
just paying straight time for the full 12 hours.

So, I have three suggestions in terms of your
wage order. If you really mean that -- if you really
want people to implement a 12-hour -- or to be able to
implement a 12-hour day after July 1 of 2000, you ought
to say that so that -- so that this Section 5 would say
“prior to 1998,” and then -- or -- and insert the words
“or after July 1, 2000,” so people realize that that’s
what you’re talking about.

Secondly, I think that you should make it clear in your Item 5 that you’re talking about both those who are continuing a 12-hour day that was voted upon prior to 1998, and those who implement a new 12-hour day after July 1, 2000, if that’s what you agree that you want to do.

And then, lastly, you need to give some comfort to employers who implement this 12-hour day for this period of time, so that if, in fact, on July 1, something happens by virtue of court order or inaction of this Commission, that they are not put at a disadvantage at that point in time and that they’re permitted to go back to an 8-hour day plus overtime, based upon the salary that would otherwise have been in effect.

So, those are our recommendations.

COMMISSIONER CENTER: Thank you.

Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

MR. ARNOLD: Thanks very much.

COMMISSIONER CENTER: I have one more, Kathryn Rees -- I guess the last healthcare. She just came in and signed the card; she was late.
MS. REES: Well, I was listening for a long time
on the box, though.

COMMISSIONER CENTER: Okay.

MS. REES: Kathy Rees, representing the
California Assisted Living Facilities Association. For
those of -- some of you who know me, this is not a realm
in which I normally work. But this particular client is
in that continuum of providing direct care to residents.
They’re not nursing homes, they are not
hospitals; they are the continuum in between. They are
for primarily the frail elderly or the dementia Alzheimer
patient. They are for those individuals who need
assistance in their day-to-day lives, their activities of
daily living, and some oversight, sometimes in reminding
them how to take their medications, how to get themselves
dressed, how to get themselves bathed. The one thing
that they have totally in common with -- with other kinds
of facilities such as nursing homes and such as hospitals
is that they do have this 24-hour, round-the-clock kind
of care that is required.

I will give you an example myself. I’m an adult
child with a set of two parents living with me with
advanced cancers, and I have to put them somewhere soon.
And they want to go somewhere soon. They do not belong
in a nursing home.

And one of the things that has made the assisted living industry so critically attractive to people like me and to people like my parents is that they have the comfort of being able to go into a safe and secure environment that’s very home-like and know that they have qualified people that are there to attend to their needs. And one of the reasons they go there is because they don’t want to be in a nursing home, but at the same time, they want to know that there’s someone there 24 hours to make sure that their needs are met.

I’m not quite sure how this industry is fitting into either this draft wage order or, quite frankly, whether it fits into Wage Order 4. We’re very confused. And so, I would only echo some of the remarks that Mike Arnold has made and that many of the speakers before me. We would hope that the imposition of the 8-hour day on these folks, who have not necessarily been doing 8-hour days -- they’ve been doing a variety of hours, 12 being very attractive for all the reasons that everybody has cited today -- that’s something in common that this industry has with others. And it has more to do with the continuity of care that’s provided, as well as many of the -- the employees’ satisfaction of working in this
environment without disruption. And frankly, many of the
employees enjoy the arrangement of being able to work a
finite number of days a week and have a finite number of
days a week that they do not work.

So, again, I would ask, in your deliberations,
that we work together and try to evaluate what to do with
this particular setting.

Again, I’m a little bit new at some of this, and
some of the people I represent are very confused about
where they sit, what they ought to do, and how we ought
to handle it. We have fought very hard for many years --
some years ago, I represented the Alzheimer’s Association
-- and to have found an approach for Alzheimer’s and
dementia patients to go, in addition, that is suitable to
their needs, not the nursing home, has been a very long,
hard, uphill battle.

And the watchword of the assisted living
movement and the assisted living facility is flexibility
to be able to provide care. And that comes in terms of
flexibility in staffing.

So, I would conclude with we’ll look for your
guidance and your assistance, because I have a hunch
we’re going to need it.

COMMISSIONER CENTER: Thank you.

MR. JONES: Am I the right Robert Jones? I just wondered.

COMMISSIONER CENTER: Yeah, we’re off healthcare right now.

MR. JONES: Yeah. I’m not healthcare.

COMMISSIONER CENTER: We’re on to motion pictures and computers.

MR. JONES: Okay, great.

COMMISSIONER CENTER: And James Neff is first.

MR. NEFF: Mr. Chairman and members, my is Jim Neff. I represent the Motion Picture Association of America, California Group, which is home to the major motion picture studios and television productions.

We have been in discussions with the staff and with others regarding the impact of this interim wage order. And we are now sufficiently convinced that Section 7 of your wage order and Section 8 of the bill do, in fact, provide language that essentially will not change any of the existing collective bargaining agreements within the entertainment industry.

We have 27 collective bargaining agreements with -- that covers roughly 40,000 people behind the camera,
and we’re just hopeful that the language that’s in your
wage order in Section 7 will, in fact, remain in that
order.

And that’s kind of my comments. Thank you very
much.

COMMISSIONER CENTER: Thank you very much.

MR. JONES: Good afternoon, Chairman Center and
commissioners. My name is Robert Jones. I’m with the
firm of Jones Durant, and we’re here today representing
the Northern and Southern California Chapters of the

We -- I provided materials to all of you with
our specific requests, and we have a very specific
request at this time.

The interim wage order, we believe, is going to
have a very significant impact on the high-tech industry.
And it’s going to have that impact because of the salary
basis test, which is now going to be written into the
wage order. I know that there’s some disagreement, among
a number of us in the legal profession anyway, as to the
continuing -- the continuing viability of the prior wage
orders with respect to the administrative and -- excuse
me

-- the administrative, executive, and professional
exemption. But specifically in the law, under Section 21, it provides that until this Commission acts to adopt a wage order, that we will continue to operate under the prior wage orders, and that’s what we -- 4-89 -- and that’s what we’ve been continuing to do, which provides for the remuneration test.

To be more specific, the enactment of this proposed order will immediately remove the current exempt status for all highly paid computer professional consultants in California. This -- I have checked with the industry, and this is somewhere around 100,000 people who work on an hourly basis, all of whom are paid in excess of $27.63 an hour.

If the Commission acts today to put the interim wage order into effect with this provision that adopts the Labor Code section on the administratively exempt salary test, we will have to notify -- and we’re prepared to do that as soon as possible, which brings me to another question as to what the implementation date is, which is one of the things I understood would be considered here today -- but we’re going to have to immediately notify the computer professionals in the State of California who are working on an hourly basis that they cannot work any hours in excess of 8 in a day.
or 40 in a week without written authorization from the employers who find these locations for them to work in the high-tech industry.

If, in fact, we do that, they will not be able to work any hours in addition to that because the contracts under which they work are fixed contracts for fixed rates per hour. That means that there will be no money to pay them the time and a half under those contracts, unless all those contracts are amended.

Now, this isn’t a new problem that we first -- that we -- this problem, the salary basis test, is something that we ran into ten years ago under federal law with the Fair Labor Standards Act. And Congress amended the law to create a specific exemption for computer professionals. And what I’ve provided to you in the information we gave to you -- and I have revised it a little bit -- is an exemption for computer professionals which we believe should be written into this order.

And I’ll get to whether you can do that or not in a moment, because I’m sure there’s some disagreement on that.

But what we did was we took the exact same language that specifically exempts computer professionals making over $27.63 an hour and creates that specific
exemption, which is exactly the same as the federal exemption for computer professionals.

The change that I made in the language was that I -- the only change in the language that I want to provide to you -- is we took out the primary duties test and put “whose duties are for more than one half of their time,” just to avoid any problem that would have to do with trying to -- the federal law, of course, uses the primary -- primary duties test.

But the rest of it is that same as Exhibit 4 of the information I provided to you -- I think it’s Exhibit 4.

If, in fact, this is enacted before we can get an exemption adopted for these people, this is going to have a very significant impact on the high-tech industry in California. There are ways that the high-tech industry in California could have this work done outside California, because it’s high-tech work. It can be done by companies who are located outside California who’d do it by way of modem and that sort of thing. There are also going to be some -- some other reasons for the companies to have that work done by their facilities outside the state. That’s the large companies.

The small companies, the entrepreneurial
companies, in California that rely very heavily on these hourly employees are going to have a very real problem in getting their products done, because the people who work on these projects have to have some continuity in being able to work whatever hours they need to work to get it done. And that’s the reason they’re paid such high salaries.

And by the way, the $27.63 is not even near what the average salary is or the average hourly rate is for these employees. It’s more around $70 or $80 an hour. With some that I’ve been dealing with recently, they were at $120 an hour.

Now, I understand -- and so, what we’re asking you to do is to adopt the exemption. And I’m asking you to do that under 515(b)(2) -- or (b)(1) -- I’m sorry. And I know that there’s an opinion from the Attorney General’s office -- or at least I’ve heard there’s an opinion -- I haven’t been able to read the Attorney General’s logic on this -- that you can’t adopt this exception without a wage board. I don’t think that that’s correct. And the reason I don’t think that’s correct is because we’re asking you -- we’re not asking you to adopt an exemption under the provisions that -- I think it’s 1178. 1178 is the
provision that provides for a wage board. We’re asking you to adopt an exemption under 515(b)(2) -- or, excuse me -- 515(b)(1), which parallels that language, but has a sunset provision and makes absolutely no reference to any wage board.

In addition to that, when you adopt these orders, 517, under which you’re adopting these orders, specifically states that they can be done without convening wage boards, period, and then goes into it shall include some other actions.

So, that’s the position that we have. We respectfully disagree on whether or not it can be done. If the Legislature had wanted to require wage boards to adopt 515(b)(1), they didn’t need to write it in there. They could have relied on 1178 and gone with that process.

So, we would request that you adopt this. If, however, it continues to be the position of the board that you cannot act to adopt this exemption to make it the same as the federal exemption to avoid this problem, then we would ask that you act as expeditiously as possible to create -- or to appoint a wage board so that we can get this done quickly, because it’s going to have a very significant impact in the interim.
The final issue is, the one thing I haven’t heard discussed here today is the effective date, even though that’s part of the agenda. And if you are going to adopt an interim wage order, we’re going to need some time to make sure that all the employees and people in the industry are notified that -- of this loss of exemption. And we would hope that you would make the effective date -- at least give us until the end of next month to make the adjustments that we need to make in order to prevent people who are making $90 an hour finding themselves in the situation where they’ve inadvertently worked overtime, and the people who are employing them are going to be taking significant losses because of that.

And I’m here to answer any questions you may have.

COMMISSIONER CENTER: Go ahead, Barry.

COMMISSIONER BROAD: I appreciate your testimony. To bring this down to sort of childhood parables, I’m afraid today we’ve got a lot of Chicken Little and not enough of the Little Engine that Could. And it seems to me that, one, these people could be paid on a salaried basis. I mean, I know that in my office when you visited me, that was sort of mission
impossible, and you indicated to me that other than the
fact that they must meet a salary test, they would
otherwise be exempt under California law. So, it seems
to me that their -- your contractual relations could be --
they could become salaried employees --

MR. JONES: Well --

COMMISSIONER BROAD: -- without this sort of
dead-of-the-world scenario occurring.

MR. JONES: Well, they actually -- I didn’t mean
to --

COMMISSIONER BROAD: No, go ahead.

MR. JONES: I guess I did mean to interrupt you.
I’m sorry.

COMMISSIONER BROAD: No, that’s fine.

MR. JONES: Actually, if we -- we can make them
salaried employees, but we can’t make them salaried
employees under federal -- under the federal precedents.
And the federal law is -- I’ve interpreted -- you know,
as I’ve read the law, if they’re salaried employees,
they’re not going to work more than 8 hours in a day,
period. Why would they work additional hours when they
can be paid on an hourly basis to work these hours
anyplace else?

This is -- here’s a situation. I have a company
who needs a project done, and they say, “We’ll pay $100 an hour to have this project done,” and we have a person who will work this for $80 an hour. And that’s our margin and covers our -- and covers the cost, the $20. If we tell this -- if this person works 16 hours a day for a week -- and I’m not saying that’s impossible -- they’ll receive 16 hours at the hourly rate. If they’re salaried, why would they agree to work anything in addition to 8 unless they’re paid a premium for that? And they’re not going to be able -- we are not going to be able to pay them an hourly bonus premium for that, under federal precedents.

COMMISSIONER BROAD: Well, except that I -- I guess I’m confused, though. I mean, I imagine that employers can build in any number of incentives for people to finish work at an earlier point, you know, performance bonuses or any other thing that -- that controls costs, or to say that this work shall be performed by a certain date. I just -- in talking -- well, let me put it this way -- I sort of came away from our discussion feeling like these are the same guys who brought us the Y2K crisis. And it’s perhaps a crisis of just the same magnitude, you know, that’s sort of -- it’s a lot of -- a lot of, you know, stress over something
that can be relatively easily resolved.

And I thought about it a lot after our discussion, and I really think that your industry should come into compliance, because I believe that the Commission is foreclosed by the clear language of the statute by creating exemptions for people by eliminating the salary test. I don’t believe that we can do that, statutorily. That is my opinion. I don’t know what my other commissioners, you know, feel here, but that is my opinion, and that your remedy would have been to seek an amendment -- or still is, perhaps -- to seek an amendment to AB 60, but that this Commission, whether it does it with wage boards or not, cannot change the salary basis test that is now in the statute.

MR. JONES: All right. Well, I’m not asking you to change the salary basis test at all, Commissioner Broad. I’m asking you to create another exemption. That can certainly be done with the -- with the -- under 515(b)(1), and it’s something that’s -- in fact, is specifically contemplated by that. And that doesn’t -- if that new exemption does not specifically contain a salary basis test, then it is an exemption without a salary basis test, because the salary basis test in the law only applies to that classification that’s set forth
in 515(a) at this point in time. There’s no place else in the law where there’s a salary basis test other than in 515(a), that I’m aware of.

And so, what -- and that’s exactly what the federal Congress did in enacting the exemption to the Fair Labor Standards Act. It created a new exemption, which the only part of the exemption is it exempts from the salary basis test because it’s created a new classification which does not specifically rely or specify a salary basis test.

California will be the only state in the union where employees who work in the -- high-tech employees who work in the computer industry making more than $27.63 an hour have to be paid overtime, period. And that is not what the intent of the legislation was, I don’t think, is to require $80-an-hour employees to be paid -- required to either be on salary or paid time and a half.

COMMISSIONER BOSCO: Could I ask, does anyone have an opinion over whether Section 515(b)(1) would enable us to grant this exemption? I know that it’s been the general view today that we’re not going to get into these exemptions. But I’m asking specifically, legally, if we had the desire to do it, could we?

COMMISSIONER CENTER: I’ll refer that to our
attorney.

MS. STRICKLIN: Under 515(b), you could -- you have the authority to make exemptions. The question is what type of exemption you would be making and whether or not you want to -- I mean, as a body, you want to.

COMMISSIONER BOSCO: No, I understand that part of it. But say if we were to recognize the congressional or the federal statute’s exemption of these computer professionals and if we wanted to simply put that same exemption into being here in California, could we do that without having a wage board or any other proceeding?

MS. STRICKLIN: I don’t know that you could.

COMMISSIONER BOSCO: Do you know that we couldn’t?

MS. STRICKLIN: I don’t know that you couldn’t either. I’d have to look into that.

It seems to me that there’s nothing -- that the salary requirement is there in 515(a).

COMMISSIONER CENTER: I think --

MS. STRICKLIN: And the other exemptions were something beyond salary, in 515(b).

COMMISSIONER CENTER: Well, I think it would be the position of the chair that we could not, unless we determined that we could. And really, we’ve heard from
this individual. There might be a computer consultant
tout there that enjoys overtime under the change in law.

COMMISSIONER BROAD: Mr. Chairman?

COMMISSIONER CENTER: Yes.

COMMISSIONER BROAD: I believe -- and, of
course, we can discuss this at length -- but I believe
that -- I was somewhat of a participant in the process of
this bill.

MS. STRICKLIN: Yeah.

COMMISSIONER BROAD: In fact, I had some hand in
drafting this section. And it was intended to make the
salary -- to codify a salary test and the "primarily
engaged" test in California law for all exemptions.

MS. STRICKLIN: Right.

COMMISSIONER BROAD: And Section (b)(1) was
intended to allow the Commission to create further
exemptions within those parameters, but only until a
certain date, at which point the Commission was no longer
legally permitted to create classes of exemptions, and
that Section (b)(1) did not relieve the Commission of its
authority or the requirement that it operate under wage
boards. In fact, only where the Legislature specifically
grants the authority to operate without wage boards may
the Commission operate without wage boards, as it’s the
wage board process that makes the Commission’s process, insofar as it’s exempt from the Administrative Procedure Act, constitutional in the sense that it grants the public procedural due process. And that’s, I think, a -- based on earlier litigation involving the Commission.

So, I mean, that’s my understanding of it. And, you know, I could be wrong, but I believe that that is accurate.

MR. JONES: Mr. Chairman, I think that the statute -- we’re ready to -- you know, if this enacted, we’re certainly ready to defend it. And I think that the law is specific, no matter what the intent was. 515(a) specifically deals with the duties that are currently termed executive, professional, those -- administrative, those duties. I mean, it’s specific.

And the other thing is that, while there is some prior law on wage boards and what they’re there for, that law would -- and Commissioner Broad is right -- that law specifically says that the -- AB 60 says, “We’re making specific exemptions.” And so, if, in fact, the law is still good law, then the Legislature didn’t have the authority to make those exemptions.

But if you look at 517 -- and that’s the only authority I found for this board to enact even this
interim order, because what you are, you’re -- I don’t
know what the authority is for this board to adopt an
interim order, because the legislative act itself says --
the only way I see that you can adopt any order is under
517. And 517(a) specifically says, “The Industrial
Welfare Commission shall, at a public hearing to be
conducted by July 1, 2000, adopt wages, hours, and
working condition orders consistent with this chapter
without convening wage boards, which orders shall be
final and conclusive for all purposes,” period. It then
goes on to say that those hearings shall include certain
things, but it doesn’t say that it’ll be limited to that.
And I think that the -- that the courts would
find that the -- that, in fact, this board would have
acted appropriately in adopting this exemption to prevent
this problem under 515(b)(1) and that they can do that
under 517 because it’s specifically allowed. And that’s
what we’re asking for.

COMMISSIONER CENTER: Thank you.
Other questions?
(No response)
COMMISSIONER CENTER: If the interim order is
passed today, it would go into effect February 15th.
MR. JONES: It would be February 15th if it went
into effect today?

COMMISSIONER CENTER: If we -- if it’s passed today, yes.

MR. JONES: And could the board consider extending that to the 30th? I mean, the notice was that we would set that -- that the board would -- we would testify about that today. So, this is -- I’m not sure where the 15th came from.

COMMISSIONER CENTER: That’s the earliest it would go into effect.

MR. JONES: That’s the earliest it would go into effect. So, we would urge this board, if, in fact, they are going to not act on our proposal, that we limit the damage this will cause in the industry by allowing us the time to correct, to at least the end of next month, 30 days, and that they convene a wage board on this issue as quickly as possible so that we can get this addressed.

COMMISSIONER CENTER: Thank you.

MR. JONES: Thank you very much. And I’ll provide revised language.

COMMISSIONER CENTER: I have Steve Zieff, Ron McKune, James Abrams, Kelly Watts, and John Zaimes. We have John Zaimes?

MR. ZAIMES: Yes. That’s me. Would you like me
to begin? I was the last one called, so --

COMMISSIONER CENTER: Oh, yeah. Whatever.

MR. ZAIMES: Very well.

COMMISSIONER CENTER: Then who wants to go first? I did them in reverse order here.

Steve Zieff?

It should be Ron McKune.

There you go. Go ahead, sir.

MR. McKUNE: Good afternoon, Chair Center and members of the Commission. My name is Ron McKune, and I’m a consultant with The Employers Group. I am here and speaking at the request of Bill Dahlman, president of The Employers Group.

The Employers Group is an association whose mission is to support the employee and labor relations functions of the employer community in California. We have a membership of over 4,500 -- 4,500 companies. They employ over 200 -- they employ over two million people in the State of California.

You’ve heard from the California Chamber of Commerce and the California Employers Coalition. The Employers Group concurs with their position.

The Industrial Welfare Commission is called to review exempt status. The Employers Group asks that the
Commission look at all duties, including duties that emanate from the duties primarily used to measure exemption to meet the exempt tests.

And lastly, The Employers Group accepts the conclusion reached by DLSE in the memo of December 23rd, 1999, that AB 60 does not prohibit on-duty meal periods where the nature of the work requires it. We ask that language formerly used in that regard again be printed.

Thank you.

COMMISSIONER CENTER: Thank you.

Who did I call next? Was it Jim or Kelly?

Kelly.

MS. WATTS: Thank you, Chairman Center and members. My name is Kelly Watts, and I’m with the American Electronics Association. I’m going to be very brief.

We have three specific issues that we’d like to address as far as clarification is concerned in these draft wage orders.

Number one, in Section 4, which is daily overtime, general provisions, in Section (A) and (B), we’d like to suggest adding the phrase “in a single workweek” to the end of each sentence. Our concern is that if we have an employee who works the back end of one
week, the front end of another week, that we would be --
the employer would be responsible for overtime and then
perhaps double time.

And number two, in Section 9, regarding meal
periods, Part (B), we’d like to see a provision adding
that would state, “In addition, the first and second meal
periods may be scheduled consecutively.” This would
allow for one full hour of a meal period rather than two
separate half-hour meal periods, if the employee decides
to do so.

Thirdly, in Section 5, dealing with alternative
workweeks, the wage order is referring to the
grandfathering-in provisions for existing 10-hour shifts
and states that, “An employee must submit a written
request to maintain their 10-hour shift, and that the
request and approval shall be made within 90 days of the
effective date of this order.” We would like to clarify
that the effective date mentioned is the date that this
order is approved, possibly here today.

And those are our concerns at this point, and we
appreciate the opportunity to clarify these issues for
our members.

COMMISSIONER CENTER: Thank you.

MS. WATTS: Thanks.
MR. ABRAMS: Thank you, Mr. Chair. My name is Jim Abrams. I’m with the California Hotel and Motel Association. I’m here to speak with specific reference to the lodging industry in California. First, by way of general comment, we support the remarks and suggestions and observations that were made by the California Employer Coalition.

With specific reference to the lodging industry, there are two main issues that we think, while they arguably apply to all employers, are specifically germane to the lodging industry.

The first has to do with the exemption for administrative, managerial, and professional employees as it pertains to part-time employees. The comment has been made that -- in the position paper, if one would call it that, the legal opinion from the chief counsel to the Labor Commissioner -- that any part-time employee who otherwise would meet the duties test to be considered exempt cannot be considered exempt no matter how few hours a week he or she might work, unless the salary is at least two times the minimum wage or the $1,933.33 a month. And you’ve talked about that a great deal.

And with all due respect, I think there is a
premise here that Assembly Bill 60 somehow mandates that conclusion. And I respectfully would submit to you that it does not. And I think it’s important that we very quickly go back and revisit the whole idea of why a salary was put into the wage orders, going back many, many years before, which is that, one, to be exempt a person has to have duties that are exempt, you have to have the kind of duties that a manager, a professional, or someone in an administrative capacity, executive capacity, would have. And secondly, you have to be paid enough so that the designation of your duties, the characterization of your duties, isn’t a farce.

And if you go back through the hearings that have been held in past years regarding the various changes in the wage orders, the key has always been that you can’t call someone a manager unless you pay him or her a certain amount of money that is consistent with the seriousness with which you are ascribing -- you’re ascribing to the duties.

And having said that, I -- we’ve now taken it out of the wage board process and we’ve put it in statute, and the Legislature has said it has to be at least two times the minimum wage.

That never really addresses the issue, though,
of what you do with part-time employees. And I -- in the
document we sent to Mr. Baron a couple of days ago, if
you take the example that Mr. Locker put forward in his
legal opinion, he says, for example, if we have an
attorney who is paid $2,000 a month and the attorney
says, “I only want to work part-time; I want to work half
a week, I want to work 20 hours a week,” and the employer
says, “That’s fine. This is a $2,000-per-month job. You
want to work half a month, I’ll pay you half of that.” I
mean, one would agree that the quid pro quo, $2,000 for a
full month’s work, if we’re going to cut the equation in
half on one side, it needs to be cut -- the equation has
to be cut on the other side.

The opinion of Mr. Locker is that this attorney,
who is exempt -- his duties are clearly exempt by virtue
of being a professional -- is now no longer exempt
because he’s being paid on a part-time basis. And the
rationale for that -- and I presume that that is at least
part of the rationale that the Commission is relying upon
and voicing -- is that you cannot ever be deemed to be a
professional employee in terms of your duties if you
don’t have ultimate control over your hours. And that’s
basically what Mr. Locker says, that the quintessential
test of whether you are truly exercising exempt duties is
that you have control over your time. And if, in fact, your employer says, “You’re only going to work 20 hours a week, 10 hours a week,” or whatever, then it doesn’t matter that you’re a doctor or a lawyer or that you’re paid a million dollars an hour. You can’t -- you just cannot be exempt. And with all due respect, I think that is way wide of the mark.

Secondly, if you take a look at this, you could say, for example -- and this comes up constantly in the lodging industry -- you have a food and beverage manager, for example -- and I will submit to you that there are many food and beverage managers whose duties are clearly exempt -- and if you will, just for the sake of argument, allow me that -- and these people will be paid perhaps $60,000 a year. A lot of them want to work part-time. The employer wants part-time because it’s a 365-day-a-year, seven-day-a-week operation. And so, a lot of these people say, “I’d like to work, you know, 20 hours a week.” And the employer says, “That’s fine. This is -- if you were working full-time, I’d pay you $60,000, but because you’re going to be one of three people now among whom I’m going to split this job up, you know, 20 hours each perhaps, or whatever it happens to come out -- I’ll
pay you $20,000.” And the cost is actually more than that, because now you have three people who probably qualify for benefits.

And if you take the position that because this employee, who, if he were working full-time, would get $60,000, is now only working, let’s say, a third of the time and getting $20,000, is no longer exempt, Mr. Broad suggested that this would make a mockery of the exemption. I really do -- and I mean this with respect -- I think to hold that part-time employees can never be exempt, period, by definition, if they -- unless they get -- unless they get at least $2,000 -- the $1,933.33 a month, each of them, maybe two, three, or four people all doing one person’s job, getting, in essence, three or four times what that job is worth as a whole, I submit that that really makes a mockery out of what the whole professional exemption was all about.

That -- so, we do feel that there needs to be clarification and an enunciation of the fact that, in fact, part-time employment, if you otherwise qualify for the exemption because of your duties, is something that is permitted under the -- in your interim wage order.

Secondly, Mr. Locker opines in his December 23 document -- and I say this with a lot of respect -- it’s
an excellent document to get everybody started down this path -- that you cannot have any kind of in-kind compensation to people and treat that as any sort of compensation in judging whether or not you’ve met the $1,993, or the two times the minimum wage. In the lodging industry, a lot of managers who, again, I would submit to you, meet the duties test, they are clearly primarily engaged in exempt duties, will receive free housing. And this, you know, will range anywhere from $500 to $1,000 a month, in terms of housing that they don’t have to pay. And we have always submitted that the value of either all or at least some of the benefits that the employer pays these exempt people should be entitled to some sort of a credit or factoring into the calculation of whether or not the employer is, in fact, meeting the two times the minimum wage test. I am not submitting to you that it necessarily needs to be on a dollar-for-dollar basis, but it is ridiculous, for example, if I have a nonexempt employee and I provide him with free housing, I can take a meal and lodging credit, up to several hundred dollars a month if you combine them all, against my minimum wage obligations, but I can’t take the same value of that meal or that lodging or whatever else and credit it against my
$24,000, roughly, per year compensation.

And I -- again, I think -- I think, with all due respect to Mr. Locker, that that is something that goes way beyond what AB 60 says and requires. And I think it’s going to start causing a lot of people in the lodging industry to say to their managerial employees, “That’s fine, we’ll pay you the $24,000 or whatever it is we’re paying you, but now you are going to have to start paying for your lodging and for your meals and for other things like that.”

And then, lastly, I do want to suggest that as it relates to alternative workweek schedules, there is a provision in your draft order that defines what a -- what the term “affected employees” and “work unit” means. And it says that in some cases, it can all -- go all the way down to one or very few people. But that appears only in the section of your wage order that relates to the healthcare industry. And other people have pointed out that it needs to be applicable to employers and employees in all industries.

Those are my comments. I would like to answer any questions that you might have.

COMMISSIONER CENTER: Commissioner Broad?

COMMISSIONER BROAD: Yeah. Taking them sort of
backwards, that test of what constitutes an appropriate unit for other than healthcare, it is in the wage orders that are reinstated, so, seeing that you’re reading -- you would take our interim wage order and put it against the other provisions of the existing wage orders. Then that is what goes into effect, which is the same answer for the question about meals and lodging. There has always been a provision that allows employers to credit the value of the meals and lodging. And I would direct you to every one of the wage orders, and -- which actually lists a room shared, an apartment, where there’s a couple, and so forth, the value of that that may be credited against the employer’s minimum wage obligation. So, in fact, that issue is dealt with, is not in any way affected by what we are doing today.

MR. ABRAMS: But may I ask, then, for clarification? Then is it the position of this Commission that the statement in Mr. Locker’s December 23 opinion -- let me finish my question, please, Mr. Broad -- that in deciding -- in determining whether an employer has paid the $1,993.33 per month, there can be no credit -- that is his word -- there can be no credit for any in-kind -- let me finish, please -- and in-kind compensation, such as, for example, lodging or meals?
So, if your position is -- the Commission’s position is that taking Wage Order 5-89 as amended in 1993, plus this interim order, if it’s adopted as it is, if you’re saying that that overrides and obviates the statement in the opinion that’s been given to --

COMMISSIONER BROAD: No, I’m not saying that at all.

MR. ABRAMS: Well, then -- then --

COMMISSIONER BROAD: Not at all.

MR. ABRAMS: -- it’s either one or the other.

COMMISSIONER BROAD: No, it isn’t, because his statement -- your relief, as it were, is a deduction off the cost of the employee’s paycheck, not a change in whether the person has exempt or nonexempt status.

Now, as to the first -- your first point, really, again -- and I -- maybe I’m missing something or maybe, with all due respect, you’re missing something -- if the employee is a part-time manager, professional that’s exempt, they are exempt, correct? And therefore, they can be permitted -- required by the employer to work any number of hours without overtime.

MR. ABRAMS: Yes, but -- but your statement presumes that he or she is exempt not only because of the duties, but because he or she is paid at least -- let’s
say it’s $2,000 a month, all right? It’s $1,993.33; let’s say $2,000. That, under your scenario -- and I listened to you in discussing this with other people -- is that the only way a food and beverage manager at a hotel who works 10 hours a week, because that’s what works for everybody, can be considered exempt so that he or she might work more or less hours some days than others, and sometimes go over 8 hours in the day without an overtime problem, is that he or she gets paid $2,000 a month and, in fact, has exempt duties.

And what I’m saying to you --

COMMISSIONER BROAD: Correct. But why do you want an exemption for someone that never works more than 10 hours a week? You never incur any overtime cost.

MR. ABRAMS: But the 10 hours, Mr. Broad -- the 10 hours is -- it may be the general rule, but the employee may, on a given day, work 10 hours, which, if he’s not exempt or she’s not exempt, is going to be overtime for two hours. Or on another -- if a person’s working 20 hours a week, sometimes he or she will work 22 hours a week.

COMMISSIONER BROAD: Or 32, or 42, or 52.

MR. ABRAMS: Well, but if you’re worried about the abuse factor -- and that’s what I kept hearing you
and Mr. Rankin talking about, is the abuse -- don’t throw
the baby out with the bath water. Build in some -- the
vast majority of employers in this state are not about to
abuse their employees. Many -- there are some who do,
and they ought to be guarded against, I agree with you.
But don’t say to yourself, because a methodology of
providing flexibility and equity in pay may arise to the
level of providing some avenue for abuse means that we
can’t go forward. Build the walls against the abuse, but
then recognize that if what you’re doing is getting paid
the equivalent of $2,000 a month, and if your duties are
truly exempt, but you’re only working half time, you
shouldn’t get paid on a full-time basis.

COMMISSIONER BROAD: Well, we have no proposal
of any sort before us on this issue. And so, I don’t --
I think it’s, at this point, quite premature to talk
about this.

MR. ABRAMS: Can I go back to your statement --
and, Mr. Center, and I appreciate your being indulgent --
this is critical.

Do I understand you, Mr. Broad, that if -- that
if I have a person who is an exempt employee, general
manager of the hotel, gets whatever he or she gets paid,
lives full-time on the property -- and let’s assume for
the sake of argument that the value of the unit is $500 a
month -- what you’re telling me is that under Wage Order
5-98 (sic), as amended in 1993, I can take a credit,
which is -- it’s a meal and lodging credit -- against the
$24,000-per-year compensation I have to pay him and still
treat him as exempt?

COMMISSIONER BROAD:  I believe that you should
discuss that with Mr. Locker.

MR. ABRAMS: No, sir. But with all due respect,
I need to -- this Commission has the ability and absolute
responsibility to tell people what AB 60 means. And Mr.
Locker is a lawyer like the rest of some of us, and is
out there desperately trying to interpret this for his
constituency, which are the employees who enforce this
law. But he has said, in my opinion and the Labor
Commissioner -- deputy Labor Commissioners in enforcing
it, “You must go by this rule, that if I give you a free
apartment, you can’t take any credit for it.” Now, all
I’m saying is I think, with all due respect to Mr.
Locker, that’s wrong. This is the entity that needs to
make it clear.

COMMISSIONER BROAD: Well, the other problem
that sort of complicates that whole credit thing is that
-- is the fact that the current minimum wage was created
by initiative. And therefore, I’m not even sure that the
credit still remains lawful at the present time.

MR. ABRAMS: Then -- if that is the case, then
you need to make it clear that the wage and hour credit
in Wage Order 5-98 (sic) -- 89 -- excuse me -- is no
longer in place. All of that is going to start to drive
some very significant economic changes throughout --
throughout the workplace.

COMMISSIONER CENTER: Mr. Abrams, we’re not
prepared to do that today, but we’ll defer to legal
counsel.

MR. ABRAMS: All we can do is put the points
forward. Thank you.

COMMISSIONER CENTER: I won’t go anywhere -- go
ahead -- I don’t want to expand the debate.

MR. ZAIMES: Thank you, Mr. Chairman and members
of the Commission. My name is John Zaimes. I represent
a group of energy generators with facilities up and down
the State of California, who are typically engaged in 24-
hour operations. And my comments today are very narrowly
focused. They are focused on -- principally on the
alternative workweek schedule section of AB 60, and they
are focused in particular on an interpretation of that
section that has been advanced clearly by Mr. Locker in
his memorandum, but I believe also by the board, that
there is a limitation on the length of a shift, under an
alternative workweek schedule, to 10 hours per day.

And I’m going to walk you, just briefly, for a
moment, through a statutory interpretation that will
include a look not only at the statute, but at the
legislative history of the statute, that I hope will
convince you that that is an erroneous interpretation of
the statute.

And I want to qualify that by telling you I did
attempt to appear at the hearings in Los Angeles a month
or so ago. I did present this, in the form of a written
submission to the Commission. I was unable to stay for
oral testimony. I have been in communication with Mr.
Locker on his position on this. And, in fact, he -- it
was he in a recent discussion who suggested that I
present my comments to the Commission, because when we
started to talk about the legislative history, I think
that that caused him a little bit of pause about the
interpretation he had developed.

First of all, let me make clear that as I --

COMMISSIONER DOMBROWSKI: Just for time, is your
issue you have an alternative workweek and that you want
to work overtime and pay them overtime?
MR. ZAIMES: The issue is, we have an alternative workweek in which we want to have a set of 12-hour shifts under the alternative workweek, on a regularly scheduled basis, and we want to pay overtime for the eleventh and twelfth hours under the -- under that.

COMMISSIONER DOMBROWSKI: Okay. For time’s sake, we have -- we have been revising this draft, and we have a basis of fact that’s been prepared that we will be voting on an issuing. And I think your issue is addressed.

MR. ZAIMES: Okay. I don’t know if I should -- if I should waive my comments, then. You’re suggesting it may be addressed favorably to me? Or should I --

COMMISSIONER DOMBROWSKI: Yes. Yes. Yes.

(Laughter)

MR. ZAIMES: All right. Lawyers are highly distrustful by nature, so I wanted -- I wanted to be sure.

Very well, then. Based on that, I’ll refrain. And as I said, if the Commission wants -- in the absence of my oral presentation, wants to look at my prior written presentation, that was submitted at the time of the December 15th hearing.
Thank you.

COMMISSIONER CENTER: Thank you.

I think that’s it.

Thank you.

MR. ZAIMES: Thank you.

COMMISSIONER CENTER: Connie Clendenan, Peter Kellison, Alan Shanedling, and Rolf Claussen.

MS. ISERI: Shall I -- shall I start?

COMMISSIONER CENTER: Yes.

MS. ISERI: Chairman Center, commissioners, I’m Joyce Iseri, with the California Alliance of Child and Family Services. Connie Clendenan was our witness, but she, unfortunately, had to leave, so I will be even briefer than we would have been.

The issue I wish to speak about today concerns on-duty meal periods. It was alluded to very briefly by the previous witness for the Employers Council. We do have other issues we intend to raise before the Commission, but at a future date.

For today, though, the -- I just wanted to explain the California Alliance of Child and Family Services is a statewide organization of providers of care for foster children, very generally. They do provide services to kids also in their homes, but also, the issue
for today is out-of-home residential treatment services
provided in what are commonly called group homes for
children.

There has been a question raised about whether
on-duty meal periods are still allowed under the
provisions of AB 60 and the interim wage order that you
are going to be voting on today. Specifically, in the
letter that we have sent to the Commission, we quote the
relevant sections of AB 60 and the interim wage order,
but also the provisions of Wage Order 5-89, as amended in
1993, which has further elaboration and mentions the
issue of on-duty meal periods and makes that allowance
and sets out the conditions for when you can have those.

I can get into more detail about why on-duty
meal periods are important in group homes, and I would do
that -- I know you’re short for time. But suffice it to
say that on-duty meal periods serve two very important
purposes in group homes.

One, they are part of the treatment program for
the children in care. These are emotionally disturbed
kids who need a very intensive, structured program, and
it’s 24-hour residential. Meal periods are not just for
the convenience of the employees so that they can eat a
meal and have a break; they’re also part of the
programmatic treatment given to these foster children. These children need to learn how to function within a family, how to act appropriately, you know, how to sit down at a table and eat, and not get into fights or get into assaultive behavior. The other important function served by on-duty meal periods is for overnight staffing. Again, this is 24-hour care. Typically, in a small, six-bed group home where they’re trying to simulate a family, you have one staff person overnight. It’s not feasible to get relief staff to come for 30 minutes or 60 minutes in the middle of the night so that the regular staff person can have an off-duty meal. I don’t think we could even recruit anyone to come, say, at three o’clock in the morning.

So, those, very briefly, are the reasons why on-duty meal periods are important. My letter does go into a lot more explanation about the kinds of children who are being cared for in group homes, what the emotional and behavioral needs are, and why meals are an important part of the whole treatment provided by group homes.

What we’re asking the Commission to do today is to clarify that, yes, on-duty meal periods are still allowed as an option by AB 60 and this interim wage order, and in the future, when you issue a final wage
order, to retain that option. Those are -- that’s what we’re requesting.

COMMISSIONER CENTER: Thank you.

MS. ISERI: Thank you.

MR. CLAUSSEN: Thank you, Mr. Chairman. My name is Rolf Claussen. I represent the Greater California Livery Association as well as I’m an owner of Barrington Livery, a limousine service in southern California.

I’m here on behalf of all the members of the association in regards to AB 60. Limousine operators currently provide public ground transportation, and we -- the reason why we use the term “livery” is that we don’t provide just limousine services, but, as well, sedans, vans, and bus services for clients throughout the State of California.

In the normal conduct of business, livery operators compete with various other providers of transportation services, including taxicabs, van shuttles, and franchise limousine companies. One major factor of a consumer’s decision in using our service is based on price. Now, while we’re -- we are regulated by the California PUC Charter Party Division and they do not allow us to offer or lease vehicles to a chauffeur unless the chauffeur owns their own -- or has their own
particular license. Such arrangement is allowed for the taxicab industry, the van shuttle industry, and these -- what we would call subcontract limousine operators. The vast -- these operators, the taxicab operators and so forth, do not have to require with any kind of minimum wage or overtime laws because they are considered subcontract.

In recent years, we have had an increase of operators, nationwide limousine operators, coming into our state that are opening up subcontract driver arrangements with their chauffeurs, which basically means that they are selling vehicles to the chauffeurs, requiring the chauffeurs to get licenses, insure themselves, and so forth, and bear the entire cost of operating. By doing this, they, again, avoid the requirements of meeting labor laws in regards to overtime, minimum wages, and so forth.

The operators in our association do have employees. We do comply with the current regulations that -- with the PUC as well as the labor laws within the state. Now, since the daily overtime does not affect these other operators, it does put our companies at a competitive disadvantage, namely because we compete for
the same block of business.

In the -- the reason I’m talking to you here today -- and I wrote this down -- I’m going to set this aside here because I can really do this better this way -- chauffeurs in our industry are paid on a per-job basis, whereas the subcontract, as you understand, is they can get a percentage of the deal and the company takes the other percentage. In our industry or with our employees, we pay the chauffeurs a percentage of the job that they do. Now, the percentage of the job is generally calculated on an hourly basis. We guarantee them a certain amount of hours to do a job, and then the rest of the income that they receive is from gratuities that are handed to them from the clients that participate or use the vehicles.

Now, because we don’t control the volume of work or when the work happens, on a day-to-day basis the volume or the work fluctuates. One day a driver may have one or two jobs, the next day he may have five or six jobs, which translates to one day he will get 2 hours’ worth of pay or 4 hours’ worth of pay, and the following day he can get upwards to 16 hours’ worth of pay.

Now, with AB 60, what is happening here is we, as operators, have to reconsider how we assign work to
chauffeurs. When they lose the days of work, they cannot make them up on the following days, if we follow by this -- this new bill here, which, in turn, will take chauffeurs that are full-time employees that do get fringe benefits and so forth, and they will become part-time employees. It’s not something that we as an industry want to see happen. It’s not something the chauffeurs want to see happen. But it’s something that will inevitably happen because we cannot afford to pay overtime for employees that work only 30 hours a week or 40 hours a week.

Now, a chauffeur that does work 40 hours a week actually earns a considerable amount of money and actually earn more than the median average of employees nationwide.

So, I am up here asking for your consideration in allowing an exemption on the daily overtime. We are in complete support of the 40-hour overtime, and we do pay our chauffeurs over 40 hours overtime. But because of the daily constraints and the shifting of the work, not having enough work one day and too much the other day, that puts a burden on our businesses and does -- and will, if we do comply with the 8-hour day, put a burden on the chauffeurs and definitely lower their wages. So,
I’m sure that they would be more -- would like to keep things the way they are, so to speak, and earn, you know, a good, comfortable living.

So, thank you for your time.

COMMISSIONER CENTER: Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

MR. SHANEDLING: Mr. Chair, members of the committee, my name is Alan Shanedling. I’m president of Fleetwood Limousine in Los Angeles.

First off, I have a question, in that many of -- people in our industry, including my own company, operate 24-hour operations. From eleven o’clock at night until seven o’clock in the morning, we have somebody in the office by themselves. And I question how we handle the meal situation, since, to be honest with you, at three o’clock in the morning, we’d probably have to wake them up to get them a meal. So, I don’t know how that comes into play or how we deal with that.

Second of all, I’ve been asked by numerous other operators as to how to deal with this overtime situation with AB 60. And I tell them they have three choices: they can pay it in accordance with AB 60, they can hire additional chauffeurs to cut down on their overtime, or
they can adjust the pay that the chauffeur makes. When I say “adjust,” as Rolf said, we pay the chauffeurs by the job. Over 80 percent of their work is transfers, either airport transfers or point-to-point transfers, for which they are given a minimum number of hours, two or three hours. Usually, in 90 percent of the cases, it does not take that minimum amount of time to complete the job.

That “non-driving time,” quote-unquote, is not applicable to overtime. Those chauffeurs today are getting that time as overtime on the 40-hour basis. If we have to start breaking down the 8-hour day and seeing whether or not they qualify for overtime over 8 hours in a day or 12 hours in a day for double time, we’re also going to start looking at whether or not they qualify -- whether there’s an overlap in jobs, such as, if we give them two hours going to the airport and two hours -- or two and a half hours coming out of the airport in Los Angeles, what if they have a pickup in Beverly Hills going to the airport? It takes an hour. They’ve got a pickup at the airport within 20 minutes thereafter going to Santa Monica. They do the whole thing in two and a half hours, and I’ve paid them for four and a half hours. Two hours isn’t applicable to overtime. Right now, they’re getting that.

We can look at the 24-hour clock and bring a
sixth day into play with the chauffeurs, because many of
our jobs do go past midnight. It’s not unusual for a
job, let’s say, on an as directed, out for an evening,
starting at seven or eight o’clock at night, to go till
one, two o’clock in the morning. We can pick up a sixth
day that way.

Travel time we can start looking at. Drivers
take the cars -- generally take the cars home. If they
have a pickup close by their home, even though we pay
them the travel time right now, they’re not -- it’s not
applicable to overtime because they didn’t actually earn
it.

What this is doing, this bill is doing, is
turning a relationship that is fairly cordial right now,
between the employer and employee, into a conflict. And
it’s turning it into a battleground.

Two examples. In 1989-1990, I was audited
because of the fact that the industry lost its exemption
at that point in time, mistakenly, when truck drivers
became -- fell under the overtime rules. I had an
auditor come in, and we calculated together. And seeing
what I had to go through, an auditor told me, he says, “I
can’t tell you officially,” he said, “Pay them over 40
hours in a week; the hell with the 8 hours per day. Your
chauffeurs are better off being paid under the federal
standard."

Just now, the first part of January, I’ve had to
calculate, based on AB 60. I had a driver, my senior
driver, under the 40-hour week, he would have been
entitled to 7 hours of overtime. Under a calculation of
AB 60, without any adjustments, he would have been
entitled to 9 hours. After I looked at the duplication,
he received overtime for 4¾ hours. I’ve got a very
unhappy senior chauffeur right now. But I cannot afford
to pay double time. I cannot afford to pay time and a
half greater than what I’m paying over the 40 hours per
week right now.

And I ask for your help, and our industry asks
for your help with an exemption for the limousine
industry.

COMMISSIONER CENTER: Any questions?

(No response)

COMMISSIONER CENTER: Thank you.

MR. SHANEDLING: Thank you.

COMMISSIONER CENTER: Anybody else want to
testify that did not sign a card?

(No response)

COMMISSIONER CENTER: Okay. This concludes the
testimony part of the hearing. Now we need to make some action on our proposed interim draft order.

Mr. Broad?

COMMISSIONER BROAD: Mr. Chairman, I’d like to move to adopt the draft interim wage order, with the following modifications:

On Page 2, Section 3(B), in the middle of that paragraph, where it says, “provided, however, that pharmacists and registered nurses shall not be considered exempt professionals,” I would move that it be amended to say, “provided, however, that pharmacists employed to engage in the practice of pharmacy and registered nurses employed to engage in the practice of nursing shall not be considered exempt professional employees.”

On Page 3, Paragraph -- well, you guys -- you want me to --

COMMISSIONER CENTER: Yeah, slow down.

COMMISSIONER BROAD: Yeah, okay.

(Pause)

COMMISSIONER BROAD: Right. And let me make it clear, I’m adding to the amended -- that includes amendments already in it, that was in our packets today. This is somewhat different from what -- this is somewhat different from what the public -- the one that says
“Draft Interim Wage Order” that already has some changes noted in it.

Yes, that one.

COMMISSIONER DOMBROWSKI: All right.

COMMISSIONER BROAD: So, I’m amending amendments that are already suggested by staff.

Okay.

On Page 3, Paragraph 4(A), where it says, “and for the first eight (8) hours worked on the seventh (7th) consecutive day of work,” add “in a workweek.”

Where’s Ms. Broyles? She’ll be floored.

Anyway -- and Paragraph (B) of that section -- COMMISSIONER DOMBROWSKI: The record will reflect that.

COMMISSIONER BROAD: Yeah. The record will reflect that she can’t be floored because she’s not here, at the moment of victory.

Anyway -- and on 4(B), where, in the last line of that sentence, where it says “the seventh (7th) consecutive day of work,” “in a workweek.”

And then, on Page 5, Paragraph (J), in the middle of that sentence, it says -- let’s see -- one, two, three, four, five -- five lines down, where it says, “employees in a work unit agreed to this flexible work
arrangement, in a secret,” strike “flexible work,” and
add “alternative workweek arrangement.”
COMMISSIONER DOMBROWSKI: “Workweek.”
COMMISSIONER BROAD: Yes. It would conform it
to the way we’ve described these things generally.
That would be the total of my suggested
amendments to the amendments.
COMMISSIONER CENTER: Is there a second to the
motion?
COMMISSIONER DOMBROWSKI: Second it.
COMMISSIONER CENTER: All in favor, say “aye.”
(Chorus of “ayes”)
COMMISSIONER CENTER: Any opposed?
(No response)
COMMISSIONER CENTER: Motion carries.
Any other proposed motions?
COMMISSIONER BROAD: Mr. Chairman, I’d like to
move that the Commission, based on the criteria set forth
in Labor Code Section 1178, convene a wage board to
establish a wage order for on-site construction, mining,
drilling, and logging. And then -- I don’t know if this
is part of the motion, but I’d like to at least direct
the staff that this be done as expeditiously as possible
and that we take applications for membership of the wage
board as soon as possible and begin immediately drafting the charge to the wage board. And there’s two things that I -- in specific, that I would like to add to this that should be included in the charge: one, to consider the issue of alternative workweek elections as they relate to peak employment in seasonal industries; and, two, that the charge to the wage board make it clear that the definition of the industries is to be those portions of the industry that are not already covered by another wage order. In other words, for example, oil manufacturing or refining is in the manufacturing wage order, and I don’t think it is our intent to start moving people out, but only to deal with the on-site portion of the industry.

MS. STRICKLIN: Would you be concerned about whether it be one wage order that ultimately results from this or four?

COMMISSIONER BROAD: My assumption is that it would be one wage order that would result, because wouldn’t we have to have four wage boards if we were to consider four separate --

MS. STRICKLIN: Yes.

COMMISSIONER CENTER: Then we need to clarify that motion. It would be four individual wage boards?
COMMISSIONER BOARD: No.

COMMISSIONER CENTER: Start with one and see where it --

COMMISSIONER BROAD: Start with one. If the Commission concludes that one of those occupations or industries should be in another place, it can --

COMMISSIONER CENTER: Okay.

COMMISSIONER BROAD: -- take appropriate action.

COMMISSIONER CENTER: Is there a second to that motion?

COMMISSIONER DOMBROWSKI: I would second.

COMMISSIONER CENTER: All in favor?

(Chorus of “ayes”)

COMMISSIONER CENTER: Any opposed?

(No response)

COMMISSIONER CENTER: The motion carries.

Any further motions? I think we need to move --

COMMISSIONER BOSCO: Could I just ask a question?

COMMISSIONER CENTER: -- on the interim -- draft interim wage order.

Yes, Mr. Bosco.

COMMISSIONER BOSCO: I know that we have passed the draft amended wage order, but did we address the
question of when it would go into effect? I was somewhat sympathetic to some of the testimony, and it seems to me that -- okay --

COMMISSIONER CENTER: Maybe I can go back. What we did was draft an -- we adopted the amendments to the order. We have not adopted the order yet.

COMMISSIONER BOSCO: Oh, okay. Then is it appropriate to ask what, if any, disadvantage would there be to, say, holding off till the first of March, giving people a month? Would that prejudice anyone?

COMMISSIONER CENTER: That’s available for a motion, if you would want to pursue that. And I don’t -- would that help implementation? It’s up to the --

COMMISSIONER BOSCO: I move that we -- that these interim wage -- that the interim wage order go into effect on March 1st, 2000.

COMMISSIONER CENTER: Is there any question to that motion, or second?

COMMISSIONER BOSCO: Any comment?

COMMISSIONER DOMBROWSKI: I’ll give you a second.

COMMISSIONER CENTER: All in favor?

(Chorus of “ayes”)

COMMISSIONER CENTER: Any opposed?
COMMISSIONER CENTER: The motion carries.
Now I think we need a motion to draft the interim wage order.

COMMISSIONER BROAD: I would move to adopt the wage order, the draft interim wage order as amended.

COMMISSIONER CENTER: Is there a second?

COMMISSIONER COLEMAN: Second.

COMMISSIONER CENTER: All in favor?

(Chorus of “ayes”)

COMMISSIONER CENTER: Any opposed?

(No response)

COMMISSIONER CENTER: The motion carries.
I think this concludes our business. Do we have a motion -- oh -- we have a statement to the basis and the summary. Do I have a motion to approve the draft statement of basis and summary?

COMMISSIONER BROAD: Can I just have one quick question, Mr. Chair?

COMMISSIONER CENTER: Yes.

COMMISSIONER BROAD: If there are minor technical corrections like spelling errors or grammatical errors or something of that, is the staff permitted, after we approve it now, to make those changes if they’re
not substantive?

MR. BARON: Yes.

COMMISSIONER BROAD: Okay. Thank you.

COMMISSIONER CENTER: Is there a motion?

COMMISSIONER COLEMAN: So moved.

COMMISSIONER BROAD: Second.

COMMISSIONER CENTER: All in favor?

(Chorus of “ayes”)

COMMISSIONER CENTER: Any opposed?

(No response)

COMMISSIONER CENTER: Motion carries.

Do we have a motion to adjourn?

COMMISSIONER BROAD: I move to adjourn.

COMMISSIONER CENTER: Second?

COMMISSIONER DOMBROWSKI: Second.

COMMISSIONER CENTER: All in favor?

(Chorus of “ayes”)

COMMISSIONER CENTER: Motion carries.

Thank you.

(Thereupon, at 3:42 p.m., the public meeting was adjourned.)

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CERTIFICATE OF REPORTER/TRANSCRIBER

--o0o--

I, Cynthia M. Judy, a duly designated reporter and transcriber, do hereby declare and certify under penalty of perjury under the laws of the State of California that I transcribed the five tapes recorded at the Public Meeting of the Industrial Welfare Commission, held on January 28, 2000, in Sacramento, California, and that the foregoing pages constitute a true, accurate, and complete transcription of the aforementioned tapes, to the best of my abilities.

Dated: February 13, 2000

______________________________
CYNTHIA M. JUDY
Reporter/Transcriber